

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	98-0147
Rulemaking proceeding to implement	:	
Section 16-119A(a) of the Public Utilities	:	
Act regarding standards of conduct.	:	
	:	
-and-	:	(Cons.)
	:	
Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	98-0148
Rulemaking proceeding to implement	:	
Section 16-119A(b) of the Public Utilities	:	
Act regarding functional separation	:	
between generation services and delivery	:	
services of Illinois electric utilities	:	

REVISED HEARING EXAMINER'S PROPOSED INTERIM ORDER

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TABLE OF CONTENTS

I. PROCEDURAL HISTORY.....	1
II. COMED'S IDC PROPOSAL.....	2
III. RATIONALE AND SUPPORT FOR COMED'S IDC PROPOSAL.....	3
A. ComEd.....	3
B. IP.....	5
C. CILCO.....	5
IV. OPPOSITION TO COMED'S IDC PROPOSAL.....	5
A. Staff.....	5
B. Mid-American.....	6
C. C&GP.....	7
D. IIEC.....	7
E. NewEnergy.....	8
F. PG&E.....	8
G. NAESCO.....	9
H. ENRON.....	9
V. ANALYSIS AND CONCLUSIONS.....	10
A. Authority to Adopt the IDC Option.....	10
B. Efficacy of the IDC Option.....	11
C. Staff's Collateral Proposals.....	16
1. Structural Separation and Passive Transmission.....	17
2. Reducing the Bundled Service Monopoly.....	18
VI. THE COMMISSION'S APPROVED RULE.....	19
VII. FINDINGS AND ORDERING PARAGRAPHS.....	47

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I. PROCEDURAL HISTORY

ComEd initially proposed the integrated distribution company ("IDC"), an optional regulatory status for electric utilities, as part of its Brief on Exceptions, filed in these proceedings on September 8, 1999. At that time, the Hearing Examiner concluded that the evidentiary record, which had already closed, did not contain a sufficient basis for assessing the IDC proposal. Accordingly, the Hearing Examiner determined that the proposal could not be adopted.

On November 17, 1999, on our own motion, the Commission reopened the evidentiary record to receive evidence, analysis and argument pertaining to the IDC.¹

Hearings were conducted on December 3, 1999 and January 18, 2000. Although all parties to the original proceedings remained parties on reopening, parties participating actively during the reopened hearings were: the Citizens Utility Board ("CUB"), the People of Cook County ("County") and the City of Chicago ("City") (collectively identified in these proceedings as the "Consumer and Governmental Parties" or "C&GP"); Blackhawk Energy Services and the National Association of Energy Service Companies (collectively identified in these proceedings as the "Coalition for Advancing Competition" or "CAC"); Illinois Power Company ("IP"); Enron Energy Services, Inc. ("Enron"); MidAmerican Energy Company ("MidAmerican"); Mt. Carmel Public Utility Co. ("Mt. Carmel"); The Peoples Gas Light and Coke Company, North Shore Gas Company, Peoples Energy Services Corporation, Peoples Energy Services Corp. and Peoples Energy Ventures Corporation (collectively identified in these proceedings as "Peoples"); Central Illinois Public Service Company and Union Electric Company (collectively identified in these proceedings as "Ameren"); the Illinois Industrial Energy Consumers ("IIEC"); Commonwealth Edison Company ("ComEd"); Central Illinois Light Company ("CILCO"); Interstate Power Company and South Beloit Water, Gas & Electric Company (collectively identified in these proceedings as "Alliant Energy"); NEV Midwest, L.L.C. ("NewEnergy"); and PG&E Corporation ("PG&E")

The parties initially and collectively agreed, pursuant to 83 Ill.Adm.Code 200.525, that the IDC proposal could be explored with written comments and affidavits, rather than by evidentiary hearings, unless substantial factual disputes arose from such comments and affidavits. Accordingly, ComEd presented a revised version of the IDC (ComEd IDC Memorandum, November 24, 1999 ("IDC Memorandum")), after which all parties were afforded the opportunity to file initial comments.

Initial comments were filed by ComEd, Staff, C&GP, IP, NAESCO, IIEC, Mid-American, PG&E, NewEnergy, CILCO and Enron. Staff's comments contained an alternate IDC proposal. Nonetheless, the parties again collectively agreed that exploration of the IDC proposals could proceed with reply comments and without evidentiary hearings.

Reply comments were filed by ComEd, Staff, C&GP, NAESCO, IIEC, PG&E and NewEnergy. Upon reviewing those comments and finding no factual issue requiring evidentiary hearings, and without receiving a request for such hearings from any party in these proceedings, the Hearing Examiner marked the reopened record "Heard and Taken" on February 17, 2000.

II. COMED'S IDC PROPOSAL

¹ The reopened proceedings were restricted to analysis of the IDC proposal. The Hearing Examiner barred the parties from revisiting the standards of conduct and functional separation requirements developed prior to reopening.

ComEd characterizes the IDC as regulatory status that an electric utility can voluntarily request, in lieu of adhering to the standards of conduct and functional separation developed in these proceedings prior to reopening. An electric utility would choose to operate as either a functionally separated utility (“FSU”) (covered by Subpart A, Sections 452.10 through 452.180 of ComEd’s proposed Part 452²) or an IDC (Subpart B, Sections 452.185 through 452.330 of ComEd’s proposed Part 452).

To operate as an IDC, a utility would initially file an implementation plan designed to comply with the requirements of Subpart B. If an implementation plan were approved by the Commission, a qualifying utility would “continue to function without functional separation between its permitted generation services and delivery services functions, utilizing the same employees to perform all such functions.” ComEd Initial Comments, at 1. An IDC would be permitted to provide delivery services, the PPO, bundled electric service (including all tariffed generation services required by the Act), “distribution-related” billing experiments and “value-added” services. *Id.* On the other hand, an IDC would not be permitted advertise or market retail electric power (whether bundled or unbundled, tariffed or non-tariffed), to enter into new competitive contracts for retail electric power, or to offer billing or pricing experiments unrelated to distribution. *Id.*, at 2.

III. RATIONALE AND SUPPORT FOR COMED’S IDC PROPOSAL

A. ComEd

Rules implementing Section 16-119A of the Act must promote efficient competition among generation services providers and prevent undue discrimination, with due regard for the effect of such rules on cost and reliability of services and the utilities’ bundled service obligation. ComEd asserts that, for several reasons, the IDC alternative will be at least as effective as the FSU regime in achieving those outcomes.

First, ComEd states that while the FSU regime attempts to control the *sharing* of competitively sensitive information within a utility’s internal organization, the IDC proposal restricts the *use* of that information for advertising and marketing purposes. ComEd Init. Comments, at 3. Since marketing and advertising are public activities, while information transfers are intra-corporate activities shielded from public view, ComEd maintains that the IDC provides greater transparency and likelihood of detection for prohibited behaviors. *Id.*, at 10-11.

Second, ComEd claims that the IDC alternative reduces anti-competitive behaviors by changing the incentives of utility employees. “The IDC, to the extent

² In keeping with the restricted focus of the reopened proceedings, ComEd did not - with one appropriate exception - propose revisions to the standards of conduct and functional separation requirements included in subpart A of its proposal. ComEd did propose revision of the “Applicability” rule in subpart A (Section 452.10) for the sole purpose of establishing the distinction between Subparts A (FSUs) and B (IDCs).

allowed by the Restructuring Act, and consistent with its reliability obligations, ceases to be in the retail electric supply business.” *Id.*, at 7. Therefore, ComEd avers, employee career advancement “will now be seen as tied to contributions to the success of ComEd as a distribution company, not as a retail electric supply business.” ComEd Reply Comments, at 29. Additionally, because violation of IDC rules could cause a utility to lose its IDC status, ComEd contends that an employee will be “disincented to break the rules knowing that his IDC could be forced into functional separation at great cost.” *Id.*

Third, ComEd asserts that customers will benefit from the preservation of the utility as a unitary entity. Under functional separation and information transfer restrictions, customer service representatives will be precluded in certain instances from addressing, or having information about, every element of a customer inquiry. In contrast, ComEd emphasizes, any IDC employee can address all aspects of a customer inquiry. ComEd Initial Comments, at 9-10. ComEd adds that ARES and ARES customers will benefit along with utility customers from such reduced “transactional complexities.” *Id.*, at 11.

Fourth, ComEd argues that utility’s election of the IDC option would encourage competitive entry in Illinois. “Common sense suggests that competitors will benefit where a utility is not marketing electric supply in competition with the ARES.” *Id.*, at 13.

Fifth, ComEd maintains that “[i]t will be much less costly for a utility to implement the IDC option because it does not require the functional separation contemplated by the [FSU] rules.”³ *Id.* Moreover, ComEd contends, “the IDC approach permits a utility to spend more resources on customer service related to the distribution business than it otherwise would because the utility will not have to spend resources on sale activities for bundled electric supply service, the [PPO], or any other retail electric supply service.” *Id.*, at 10.

Sixth, ComEd notes that its IDC proposal includes several provisions designed to discourage, preclude and penalize improper conduct. Proposed Sections 452.260 and 452.80 prohibit, respectively, certain misrepresentations to the public and specified discriminatory conduct. Proposed Section 452.310 creates an informal complaint procedure involving an intra-utility ombudsman. Proposed Section 452.320 contemplates loss of IDC status as a penalty for repeated violations of IDC rules. Additionally, ComEd proposes to distribute a “Customer Choice Bill of Rights” to its customers and customer contact personnel, to “make it less likely that a customer will make a choice based on impermissible marketing by a ComEd employee.” ComEd Reply Comments, at 2. These provisions and actions, ComEd argues, make it likely that the theoretical benefits of the IDC proposal will be realized in practice.

³ It is not apparent to the Commission, however, that the higher utility costs associated with the FSU option could be passed on to customers. Rates for bundled electric power and energy cannot be raised during the transition period (absent exceptional circumstance), and rates for other generation services will likely be constrained by competition.

B. IP

IP “strongly supports” adoption of “a set of rules for IDCs as an *alternative* means for complying with the [Act].” IP Reply Comments, at 1 (emphasis in original). In IP’s judgment, if a utility “is willing to exit that [retail electric] market to the maximum extent permitted by the [Act], fewer restrictions would be necessary to create efficient competition.” *Id.*, at 2. IP maintains that ComEd’s proposal appropriately accommodates this “trade-off.” *Id.*

IP additionally emphasizes that bundled service consumers will benefit from an IDC’s continued ability to handle customer contacts through a single service representative, *Id.*, at 3, and that ARES will “not have to counter utility marketing programs.” *Id.*

C. CILCO

CILCO states that it “does not oppose the concept of an IDC, but recommends minor changes.” CILCO Init. Comments, at 1. First, CILCO contends that IDCs should be barred from renewing or extending “existing competitive contracts with customers except to the extent the IDC is already contractually bound to renew or extend at the customer’s option, and the customer has exercised its option.” *Id.*, at 1-2. Second, CILCO recommends that “any billing experiment offered to bundled customers by an IDC shall be offered under the same terms and conditions at the same time to delivery services customers, and shall have the same economic value for delivery services customers as for bundled customers.” *Id.*, at 2.

IV. OPPOSITION TO COMED’S IDC PROPOSAL

A. Staff

Staff asserts that ComEd’s IDC proposal “does not satisfy Section 16-119A of the Act” and contains provisions that violate the Act because “the Commission cannot revoke or restrict, through a rulemaking proceeding, existing provisions of the law.” Staff Init. Comments, at 3. Accordingly, Staff recommends rejection of ComEd’s IDC proposal.

Nonetheless, Staff addresses specific provisions of the IDC proposal and the arguments underlying them. Staff asserts that a commitment to refrain from offering *non-tariffed* retail electric power “clearly represents a superior approach to preventing undue discrimination associated with the provision of those services than does a standards of conduct/functional separation approach.” *Id.*, at 6. This is so, Staff avers,

because such an IDC commitment “would be much more susceptible to objective regulatory enforcement.” *Id.*

However, with respect to *tariffed* and bundled electric power, Staff objects that, “the only standard that ComEd would apply...is that an IDC would commit not to advertise or market [such] service.” *Id.*, at 7. Staff believes this is an inadequate constraint in a competitive market. “The act of providing retail power and energy service, in and of itself, creates discriminatory opportunities...primarily through information advantages. Furthermore, an integrated electric utility has strong incentives to exploit these discriminatory opportunities.” *Id.*, at 8. “An IDC’s incentives (an and IDC’s employees’ incentives) would still lie in retaining...and in obtaining power and energy customers.” *Id.*, at 10.

Moreover, Staff challenges ComEd’s claim that restrictions on marketing and advertising will make the IDC regime easier to enforce than standards of conduct and functional separation. “It may not be possible, under any circumstances, to construct a rigorous standard to define what is ‘not marketing’ or ‘not advertising’ or ‘not promoting’ power and energy service.” *Id.*, at 14. Furthermore, because ComEd’s proposal allows an IDC to advertise and market billing and pricing experiments and conduct general promotion of the IDC’s image, the Commission “will likely be called upon to ascertain when an IDC advertising program “goes over the line.” *Id.*

Staff offers its own IDC proposal as an alternative to, and improvement upon, ComEd’s proposal.⁴ In Section 452.360 of its proposal, Staff suggests inclusion of a “Competitive Choice Block Bid Service” program, in which residential customers could enter a voluntary pool of end users served by an alternative power supplier selected through competitive bidding. Staff Reply Comments, at 13-14. In Staff’s view, programs like this one are necessary to genuinely remove a utility from the retail power market and, thereby, justify IDC or comparable status. The provisions of Staff’s proposal are discussed in greater detail in the “Analysis and Conclusions” section of this Order.

B. Mid-American

Although Mid-American, as an incumbent utility, would be eligible to select the IDC option, it nonetheless recommends rejection of ComEd’s proposal. Mid-American stresses that ComEd’s proposed advertising and marketing restrictions do not extend beyond energy supply to the “value-added services and other products that will bring more value to customers and create opportunities for retail electric suppliers and other competitors.” Mid-American Reply Comments, at 2. Mid-American maintains that, “[i]n a commodity marketplace, it will likely be these value-added services and other

⁴ Even though Staff purports to offer its proposal “in the interests of providing the Commission with additional options for consideration,” it nevertheless avers that it “has not taken a position on whether some form of IDC rule should, in fact, be adopted by the Commission.” Staff Reply Comments, at 3.

products that will allow retail electric suppliers to differentiate themselves in the marketplace.” *Id.* Mid-American specifically identifies curtailable/interruptible service riders, *Id.*, at 4, and billing and pricing experiments, *Id.*, at 6, as IDC services and products that will not be governed by ComEd’s proposed IDC advertising and marketing restrictions.

C. C&GP

The C&GP indicate that they do not oppose ComEd’s IDC proposal “per se,” but insist upon certain modifications. C&GP Init. Brief, at 7. Specifically, the C&GP recommend a ban on “image advertising” or, alternatively, a requirement that one-half of an IDC’s advertising budget be allocated to Commission-approved advertising “promoting choice and educating customers on reliability.” *Id.* C&GP also request closure of “potential loopholes regarding value-added services,” and stronger penalties to ensure enforcement. *Id.* Without these modifications, C&GP recommend adoption of Staff’s IDC alternative or rejection of the IDC as an option. C&GP Reply Brief, at 6-7.

D. IIEC

The IIEC oppose ComEd’s IDC proposal. The IIEC emphasize that an IDC must and will offer bundled energy and the PPO in the marketplace. As the IIEC note, one of ComEd’s own witnesses acknowledges that the Act “affirmatively provides utilities with tools that will help to retain bundled service as an option for customers. The Act does not make bundled service a second best service that customers will be happy to escape.” ComEd Exh. 15, at 21-22, cited at IIEC Init. Comments, at 3-4.

When offering bundled electric power and the PPO, the IIEC argue, an IDC will derive competitive advantage from its dual role as delivery services provider and electric power provider. IIEC Init. Comments, at 2. It is this competitive advantage, not advertising and marketing, that the IIEC believe must be restrained by our rules. *Id.* Therefore, the IIEC contend, every incumbent utility should be governed by both separation requirements and conduct standards. *Id.*, at 4-5.

Additionally, the IIEC characterize the IDC proposal as a ploy to enjoy the competitive advantages of integrated operation now, then functionally separate in 2006, after the statutory obstacles to recovering separation costs have expired. *Id.*, at 14. In support of their theory, the IIEC cite ComEd’s response to a data request in which ComEd stated, “utilities should be able to recover any capital or recurring costs associated with complying with the Commission’s functional separation requirements, provided those costs are reasonably incurred to meet the requirements of the ruling.” IIEC Init. Comments, at 14.

The IIEC also assert that ComEd’s IDC proposal contains vague and inconsistent provisions that would enable an IDC to evade the restrictions the rules

purport to impose. *Id.*, at 7-13. For example, the IIEC state that while ComEd's proposed subsection 452.200(b) surrenders the statutory right to reduce tariffed rates upon seven-days notice, it does not prohibit manipulation of terms other than price. *Id.*, at 8-9. The IIEC believe that such non-price terms are important to customers and can be adjusted for competitive advantage within the IDC rules. *Id.*, at 9.

E. NewEnergy

NewEnergy apparently opposes ComEd's IDC proposal, even with the modifications described in ComEd's reply comments.⁵ NewEnergy's principal objection is that the penalty provisions in the proposal do not include sufficient protection against anti-competitive behavior by utility employees. Specifically, NewEnergy believes that ComEd's modified definition of a "material violation" ("actions...determined...to manifest a specific intent to violate any of the [IDC] rules...where such actions...have a substantial impact on the market") places too great a burden of proof on the Commission or a complaining party. NewEnergy Reply Comments, at 2. NewEnergy contends that proof of specific intent and market impact should not be necessary to establish a violation. *Id.*

NewEnergy also argues that an IDC should be required to offer distribution-related billing and pricing experiments to all similarly-situated customers, including competitors' customers, without discrimination. *Id.*, at 3. Further, NewEnergy recommends that IDC's be precluded from renewing, extending or renegotiating existing retail electric power contracts, "unless there is such a clause in an existing contract to do so." *Id.* NewEnergy additionally requests IDC assurance that customers will not receive "adverse, discriminatory or punitive treatment" in retaliation for a complaint against an IDC. *Id.*

F. PG&E

PG&E argues that ComEd's IDC proposal will "advance the inherent advantages of incumbent utilities," rather than advancing competition. PG&E Init. Comments, at 2. As a result, PG&E contends, alternative suppliers will not willingly incur the considerable expense necessary to enter the Illinois retail electricity market. PG&E notes that the incumbents, in contrast, will not have market entry expenses. *Id.*, at 3.

PG&E dismisses the importance of ComEd's proposed advertising restrictions, emphasizing that the IDC will nevertheless be in competition with other energy providers and will start with "100% of the market with no acquisition costs." *Id.*, at 4.

⁵ NewEnergy states that "there is a distinct possibility that in the near future ComEd will propose additional revisions that, in the view of NewEnergy, would make the proposal acceptable." NewEnergy Reply Comments, at 1. The Commission notes that the record in this reopened proceeding is closed. There is no procedural mechanism in place for entertaining either an "additional revision" or NewEnergy's reaction to such revision. Therefore, NewEnergy's position in these dockets will be derived from its filed comments.

Moreover, the incumbents will benefit from “name recognition, a longstanding relationship with the customer and customer inertia.” *Id.*, at 6 (footnote omitted). Additionally, PG&E asserts, under ComEd’s proposed Section 452.270, an IDC will have preferential access to delivery services information, which will confer marketplace advantage “to those in the IDC who are providing value-added services in competition with ARES.” *Id.* Such preferential access, PG&E avers, “will be far more valuable to the IDC than the ability to advertise bundled service or the PPO.” *Id.*, at 7. PG&E makes a similar argument regarding access to customer-supplied information. *Id.*

In PG&E’s view, value-added services “are an important, if not the most important,” class of products for alternative energy providers. PG&E Reply Comments, at 2. “There will be an even greater focus on value-added services during the period that delivery services customers must pay a transition charge, when there will be only a very limited opportunity to sell competitive energy at a profit.” *Id.* PG&E asserts that the IDC proposal allows an incumbent to “leverage its monopoly position in regulated utility services [information]” to gain competitive advantage regarding value-added services. *Id.*, at 3.

G. NAESCO

NAESCO contends that by adopting ComEd’s IDC proposal, “the Commission would inadvertently be exercising jurisdiction over the energy services industry...by skewing the marketplace towards one provider.” NAESCO Init. Comments, at 5. NAESCO also charges that allowing utilities to market energy services without functional separation is “tantamount to providing them with a subsidy” for their energy services. *Id.*, at 7. This “subsidy” is derived from access to customer information, which the incumbents possess solely because of their continuing role as monopoly providers of transmission and distribution. *Id.*, at 9. NAESCO asserts that other states “have established rules that specify that any such information that is available to a competitive function or arm of a utility must be made available, at the same terms and costs, to all competitors.” *Id.*

Despite the foregoing concerns, NAESCO indicates that ComEd’s IDC proposal would be acceptable if two conditions were imposed. First, an IDC should be “allowed to market only the tariffed electric commodity,” but not “special contracts.” NAESCO Reply Comments, at 4. Second, an IDC could only offer “products other than...tariffed electric transmission and distribution services” after an evidentiary proceeding before the Commission.” *Id.*

H. ENRON

Enron argues that even if an IDC “plans not to actively market electricity to customers, nonetheless it will be offering an electricity product to customers (e.g., a bundled product) and appropriate separation rules must be in place.” Enron Init. Comments, at 2.

V. ANALYSIS AND CONCLUSIONS

A. Authority to Adopt the IDC Option

Staff has been advised by the Commission's Office of General Counsel ("OGC") that elements of ComEd's IDC proposal contravene the Act. Staff Init. Comments, at 3. Staff notes that under ComEd's proposed subsections 452.200(b) (tariffed rate changes), 452.200(c) (retail electric power contracts) and 452.200(d) (billing and pricing experiments unrelated to distribution), a utility would surrender statutory rights. "[T]he Commission cannot revoke or restrict, *through a rulemaking proceeding*, existing provisions of the law." *Id.* (emphasis added).

However, Staff believes that an individual utility can "voluntarily agree to forego certain rights as part of a negotiated settlement between the Commission and that individual utility." *Id.*, fn. 1. Accordingly, Staff offers OGC's suggestion that the IDC option be made available - if at all - by including a waiver provision in our functional separation/conduct standards. A utility "would be required, *through a separate proceeding*, to satisfy certain conditions before the Commission would grant the waiver." *Id.*, at 4 (emphasis added).

ComEd responds that "nothing in the Act prevents an electric utility from voluntarily relinquishing opportunities that it might otherwise have." ComEd Reply Comments, at 5, citing Institute of Shortening and Edible Oils, Inc. v. ICC, 45 Ill.App.3d 98, 359 N.E.2d 231, 3 Ill.Dec. 821 (1977). Rather, ComEd argues, "administrative regulations cannot abrogate *mandatory* statutory requirements, nor may they impose *mandatory* conditions upon the exercise of statutory rights." *Id.*, at 5-6 (emphasis in original). ComEd asserts that neither circumstance is present here because a utility is not obligated to provide the services that an IDC would forego and because its proposed rules impose no mandatory conditions on the exercise of statutory rights. *Id.*, at 6.

"[A] party generally may waive a substantive rule of law, a statute, and even a constitutional provision enacted for his or her personal benefit." Raimondo v. Kiley, 172 Ill.App.3d 217, 526 N.E.2d 457, 461, 122 Ill.Dec. 198, 202 (1988). However, Staff's objection goes to the extent of our power to adopt a waiver requirement *in a rulemaking*, as contrasted with our power in another context to accept a utility's voluntary surrender of a statutory right. We note that it does not matter that the IDC option was suggested by a utility. Since it would be a rule of this Commission if adopted, we must ignore its origins and look solely at the extent of our rulemaking authority.

This threshold legal analysis need not consider every component of the IDC alternative. Most of the proposed provisions do not involve a waiver of rights. They

merely replicate provisions of the FSU alternative (e.g., prohibitions on product tying and cross-subsidy) or authorize conduct that the FSU alternative prohibits (e.g., employee access to delivery services information).

The ComEd IDC provisions that do involve waiver of statutory rights are proposed Sections 452.200 (“Impermissible Services and Practices for an [IDC]”) and 452.210 (“Marketing and Advertising”). Subsection 452.200(a) bars an IDC from offering non-tariffed electric power and subsection 452.200(c) prohibits new non-tariffed electric power contracts. Subsection 452.200(b) precludes a utility from reducing the price of a tariffed service on seven-days notice (as allowed by subsection 16-111(f) of the Act), but permits reductions pursuant to other parts of the Act. Subsection (d) prohibits utility billing and pricing experiments unrelated to distribution and the use of such experiments to retain bundled electric power customers. Subsection 200.210 forbids advertising and marketing of bundled electric power, the PPO or any other retail electric power service. Absent an election of IDC status, a utility would be free of these restrictions. The issue, therefore, is whether such restrictions can be adopted in this rulemaking.

Under the judicial decisions cited above, the resolution of this issue depends upon whether the utility’s assumption of IDC status is a genuinely voluntary act. The Commission concludes that it is. IDC status is not imposed upon a utility; it is an option that a utility may select. Moreover, the FSU regime is not so onerous that rational utility management would, of necessity, take refuge in IDC status. To the contrary, our FSU rules are reasonable, balanced and do not contain the restrictions discussed in the preceding paragraph. In effect, a utility would choose between rules allowing the greater market freedom of an FSU and the reduced compliance burden of an IDC. That choice would be fair, rational and voluntary. Furthermore, under ComEd’s proposal, a utility can seek to shed its IDC status and operate under our FSU rules. Therefore, the Commission has sufficient authority to adopt an IDC option in this rulemaking.

B. Efficacy of the IDC Option

ComEd argues that the IDC proposal removes an incumbent utility from the retail generation market to the fullest extent permitted by the Act, thereby minimizing the incentives to discriminate against other energy providers and exploit information for competitive advantage. ComEd also contends that the IDC option discourages non-compliance and reduces conflict because violations of IDC restrictions are committed through publicly observable behavior. (“[T]he focus of the rules is not on information flows, but on *external* conduct such as marketing and advertising.” ComEd Reply Comments, at 13 (emphasis in original).) Fewer resources are then likely to be diverted to compliance disputes. Consequently, ComEd maintains that the IDC option achieves the outcomes sought by Section 16-119A, but without the burden of functional separation and information transfer restrictions.

Staff and other parties respond that ComEd's proposal does not withdraw the utilities from the energy marketplace to the extent permitted by the Act and that, even if it did, the statutory requirement to offer tariffed services and the PPO, along with the opportunity to offer value-added services and billing experiments, will keep the utilities in a competitive mode. As a result, the opponents insist, the incumbents will have incentive and opportunity to exploit competitive advantages derived from the transmission and distribution monopoly, without the constraints of functional separation and conduct standards. Staff and others also maintain that the IDC proposal will generate as many compliance disputes as the FSU regime.

The Commission will not adopt an IDC option as an alternative means of achieving the pro-competitive and anti-discriminatory objectives of Section 16-119A unless it is as likely to achieve those objectives as functional separation and standards of conduct. Moreover, we will not adopt the IDC option if it is more likely than the FSU regime to embroil the Commission, providers and consumers in disputes concerning its operation.

The Commission agrees with Staff and other parties that ComEd's IDC option, as proposed, will not sufficiently reduce a utility's participation in the retail power market to promote efficient, non-discriminatory competition. Powerful incentives will remain for the utilities and their employees to sell tariffed services, the PPO and value-added services. Furthermore, the incumbents will possess competitively sensitive information as a result of their historic and continuing role as exclusive provider of transmission and distribution. ComEd's IDC proposal does not adequately constrain those incentives and advantages. Also, ComEd's IDC proposal is as likely as the FSU to entangle the Commission and market participants in compliance disputes. Therefore, we will not adopt the ComEd's IDC proposal in its present form.

The IDC concept has merit, however. As Staff states, an IDC's commitment to abjure the authority to provide non-tariffed electric power is a "superior approach" to preventing discrimination and other anti-competitive behavior. Staff Init. Brief, at 6. Since the law obliges the incumbents to sell bundled energy service and PPO, we must design rules that make the provision of these mandatory retail electric power services truly passive. With genuine and enforceable passivity, the balance between the FSU regime (controlling active electric power sales) and the IDC (allowing passive electric power sales) becomes rational.

Accordingly, the Commission will approve IDC rules that we have drawn from the ComEd and Staff proposals and the comments of other parties. These rules focus on those factors that must be appropriately controlled before an electric utility can operate outside of the FSU regime. Those factors are: 1) the existence and magnitude of incentives for utility employees; 2) market exit and passive service; 3) access to information; and 4) effective penalties. Our intention is to reduce to acceptable levels the utility's incentives and opportunities to discriminate against competitors and frustrate customer choice. We will discuss these factors in turn.

Employee Incentives - Tariffed services, particularly bundled retail electric power, have historically provided the bulk of utility revenues. Through performance incentives and participation in company equity, utility employees have benefited from those revenues. The advent of competition will not, by itself, meaningfully alter those dynamics in the foreseeable future, because of the requirement to continue providing bundled electric power and other tariffed services, as well as the new PPO. Consequently, rational utility employees will endeavor to sell those services actively, whether to enhance revenue or, at the least, to retain customers that might be otherwise lost to competition. Therefore, clear and substantial incentives and disincentives must be put in place to elicit different employee behavior.

ComEd understands this. It claims that “compensation has been, and will continue to be, adjusted to reflect the new corporate goals [to focus...on becoming a top flight distribution company and away from...retail electric supply business].” ComEd Reply Comments, at 29. However, ComEd’s IDC proposal has no provision addressing employee compensation. In its proposed subsection 452.220(a), Staff attempts to fill this void by requiring a prospective IDC to identify the rewards and penalties by which it will modify employee behavior. Our rule embraces Staff’s position. Without an *a priori* showing of appropriate incentives and disincentives, the Commission will not approve a utility’s application for IDC status.

Market Exit and Passive Service - When a utility ceases to offer a service, it is self-evident that employee incentives regarding that service disappear. Under ComEd’s proposal, an IDC would refrain from selling certain services, and employee incentives pertaining to those services should be greatly diminished.⁶ Incentives to sell statutorily mandated services can also be materially reduced if the utility offers those services passively, and if it severs the connection between those services and employee compensation and advancement.

Although ComEd’s IDC proposal requires a significant degree of market passivity and market exit (indeed, the proposed surrender of the right to enter into new energy contracts is the plan’s most attractive element), it does not go far enough. A greater degree of market withdrawal, genuine passivity regarding mandatory services, and additional restraints on commercial opportunity are necessary.

Moreover, an acceptable IDC regime requires more clarity and certainty than ComEd’s proposal contains. Doubts and disputes regarding what constitutes, for example, a “distribution-related” billing experiment or “substantial [market] impact” (of a rules violation) will discourage competitive entry and clog the Commission’s dispute-resolution processes.

⁶ Such incentives would not disappear entirely, since IDC employees would have a rational self-interest in combining permitted IDC services with non-IDC services offered by the IDC’s affiliates, and in steering customers of non-IDC services to affiliates of the IDC.

Accordingly, the rules adopted here refine the IDC proposal to reach ComEd's stated objective of removing the IDC from energy supply (to the extent permitted by the Act) and defining it as a distribution company.

Access to Information - Efficient, non-discriminatory competition can be promoted by denying certain utility employees access to commercially sensitive information, by requiring equivalent access to such information for all competitors (and customers), or by a combination of those regulatory mechanisms. Such measures constrain the utility's opportunity to exploit information acquired through its transmission and distribution monopoly and equalize the opportunity for information exploitation by all competitors. Accordingly, the FSU/standards of conduct regime contains both intra-utility information transfer restrictions and disclosure requirements.

In contrast, ComEd's IDC proposal operates on the premise that the utility remains an "integrated" whole, with information flowing freely within the company but not used for competitive advantage.⁷ "[P]otentially useful competitive information...has no effect on customers, the market, competition, and competitors unless it is *used* to retain customers." ComEd Reply Comments, at 26 (emphasis in original). Although Staff responds that even an IDC must operate with certain internal information transfer restrictions, Staff Init. Comments, at 28-29, ComEd counters that Staff's proposed restrictions are "contrary to the very concept of the IDC proposal" because they would create "functional separation within an IDC utility." ComEd Reply Comments, at 42.

The Commission agrees with ComEd that Staff's recommended internal restrictions disregard the rationale underlying the IDC proposal. Moreover, Staff's proposed Section 452.270 - which involves judgments concerning what an IDC "can be reasonably expected to know" and whether an IDC employee "devotes more than fifty percent of work time" to a particular utility function - is too vague for the utilities to implement and too likely to entangle the Commission in dispute resolution.

However, the Commission rejects the notion that ComEd's IDC proposal adequately prevents first use of commercially valuable information possessed by the utility as a result of its transmission and distribution monopoly. To the contrary, ComEd's scheme allows the use of such information to sell distribution-related value-added services and to conduct distribution-related billing and pricing experiments. Therefore, an IDC has the unique opportunity to offer solutions to customer concerns before competitors are even aware that such concerns exist. PG&E Init. Comments, at 7. The opportunity for first contact with the customer is itself a thing of value in a commercial context and is certainly useful to customer retention.⁸

⁷ Section 452.240 of ComEd's IDC proposal prohibits the use of certain information provided by customers and competitors "to market any retail electric supply service, or to attempt to retain a customer for any retail electric supply service."

⁸ We note that customer issues will not necessarily fit neatly into a single service category. For example, PG&E presents a hypothetical situation in which it would offer value-added services as an appropriate solution for "voltage anomalies." PG&E Init. Comments, at 7. ComEd counters that this would be "a distribution issue." ComEd Reply Brief, at 27. This suggests that a customer's concern may be

Additionally, ComEd's proposed Section 452.270 expressly authorizes IDC employee access to information about the utility's transmission and distribution system and explicitly permits selective sharing of such information with an ARES (such as an affiliated ARES) without wider dissemination. The Commission believes, however, that such information is competitively valuable. It is essential to business planning and product development by alternative energy suppliers and many end-users. It is also generally unavailable from sources outside the utility. Consequently, an IDC would have the opportunity to shape business plans and strategies, to design products and services consonant with planned changes to the delivery services system, and to prepare marketing and advertising, before competitors could even begin those processes. Moreover, an IDC could divulge such intentions to affiliated ARES, thus conferring an additional benefit on the IDC's corporate family. The Commission rejects this element of ComEd's IDC plan.

Instead, the Commission will adopt rules that constrain the utility's opportunity to unfairly exploit transmission and distribution information and information provided by customers and competitors. We will accomplish this with comparability requirements and usage restrictions. Comparability of access to transmission and distribution system information is readily enforceable, because of the high visibility of system changes. The resolution of a dispute will likely rest on the presence or absence of disclosure, which is easily proven.

Effective penalties - These provide a deterrent to the incentive to exploit restricted opportunities for competitive advantage. Effective penalties also facilitate competitive entry, by signaling to potential market participants that behaviors inimical to efficient competition will not go unchecked. Therefore, penalties must be sufficiently certain and "painful," so that the reward for violation will not exceed either the likelihood or impact of sanction.

ComEd acknowledges that incentives to engage in prohibited anti-competitive conduct will exist within the IDC (although it argues that such incentives will be "severely reduced," ComEd Reply Comments, at 30 (emphasis deleted).) Such incentives will persist as long as the utilities and their corporate affiliates participate in the retail energy market. It follows that effective penalties are vital to the development of efficient competition.

ComEd's recommended penalty structure (proposed Section 452.320) is deficient in three important respects. First, as a prerequisite to termination of a utility's IDC status, ComEd would require three violations that evince "a specific intent to violate any of the rules provided in [ComEd's proposed] Section 452.200." "Specific intent" raises thorny proof problems, particularly for an agency established to oversee public utilities, not to adjudicate issues concerning the mental state of individuals.

amenable to plural solutions - that is, an IDC solution involving distribution services and an ARES solution involving energy services. Thus, the fact that an IDC could only use information in support of its distribution services would not mean that such use conferred no competitive benefit on the IDC.

Moreover, even if the Commission were an appropriate forum for discerning “specific intent,” a finding on that issue is, at best, only marginally relevant to our interest in promoting efficient, non-discriminatory competition. Utility conduct without specific intent can still pose a substantial threat to our pro-competitive objectives.

Second, ComEd limits our inquiry to violations of its proposed Section 452.200 (impermissible services and practices for an IDC). However, other conduct, such as discriminatory provision of delivery services (ComEd’s proposed Section 452.280), improper use of commercially sensitive information (proposed Section 452.240) and the advertising and marketing of ostensibly passive generation services (proposed Section 452.210), can undermine efficient competition as powerfully as a violation of ComEd’s proposed Section 452.200.

Third, ComEd would require a finding that even proven violations of its proposed Section 452.200 “have a substantial impact upon the market.” NewEnergy emphasizes that this would require the Commission “to determine if any given activity by ComEd *is itself*...having a substantial market impact.” NewEnergy Init. Comments, at 2 (emphasis added). The Commission agrees with this criticism. We would have to determine what market “impact” is, whether it is “substantial,” and whether a discrete IDC action or procedure - apart from all other causes - had such market impact. NewEnergy is correct that this would require an “inappropriately lengthy enforcement process...[with] dueling economists and consultants.” *Id.*

ComEd maintains that a utility’s IDC status should not be jeopardized by any violation, “however insignificant.” ComEd Reply Comments, at 46. Its proposed penalty provision was presumably designed to preclude that result, as well as to discourage competitors and others from threatening an IDC with insubstantial claims. Nonetheless, if sanctions cannot be imposed because threshold standards are too vague, if marginally relevant issues must be resolved while significant allegations (e.g, discriminatory delivery services) cannot be considered, and if necessary proofs cannot, in practice, be usefully marshaled, the likelihood of suppressing anti-competitive behavior will be severely diminished. In turn, energy suppliers will be discouraged from market entry, and customer choice will be restricted. Consequently, our rules must contain clear, relevant, strong and enforceable penalties.

C. Staff’s Collateral Proposals

Staff’s IDC proposal contains provisions that differ dramatically from ComEd’s proposal and would substantially alter the character of the incumbent utilities and their participation in the retail electricity market. One proposal would require the incumbents to exit the generation market entirely, through structural separation, and relinquish control of transmission and distribution. The second proposal would retain generation within the utility but lessen its bundled service monopoly.

1.) Structural Separation and Passive Transmission

Staff's proposed subsection 452.240(b) provides that, one year after approval of its IDC implementation plan, a utility "shall not engage in generating or producing electric power and energy for sale." Under Staff's proposed subsection 452.240(c), after December 15, 2001, an IDC "shall not engage in functional control of transmission system operations." In effect, these Staff proposals would structurally separate an IDC into a distribution company (with a passive transmission component) and one or more generation affiliates.

ComEd responds that both of Staff's proposals were considered by the Illinois Legislature when it revised the Act, but not adopted. ComEd Reply Comments, at 35. ComEd contends that, "the same result is required here." *Id.* However, ComEd also argues that a utility may "voluntarily relinquish opportunities" in return for IDC status, and does not explain why Staff's provisions constitute something other than the voluntary relinquishment that ComEd finds permissible. It may be that ComEd is simply disinclined to relinquish the particular opportunities targeted by Staff.

Nevertheless, the Commission will not include Staff's structural separation provisions in the IDC rule adopted today. By barring the utilities from power generation, Staff would effectively disintegrate the integrated utility. This contradiction in terms renders the IDC a nullity and makes IDC rules superfluous. While structural separation has appeal for this Commission, the Act allows the incumbents to retain a generation function. Therefore, irrespective of any authority we may have to approve a utility's voluntary surrender of that function, the Commission prefers to implement the Legislature's choice in the first instance. If the IDC regime proves antithetical to efficient competition, we can test the limits of our authority, or seek additional authority, at a later date.

As for transmission, the benefits of Staff's proposal are not readily apparent. An IDC can satisfy Staff's proposed subsection 452.240(c) by transferring its transmission facilities to a separate company or "through participation in an approved operating independent system operator ["ISO"] or regional transmission organization ["RTO"]." Consequently, Staff's proposal adds little to the requirement in Section 16-126 of the Act that Illinois utilities shall (in most instances) join an independent system operator.

Moreover, Staff acknowledges that "all of the Illinois electric utilities (except Mid-American and Mt. Carmel) are either members of the Midwest ISO (or have applied to become members) and the Midwest ISO...[intends]...to begin transmission operations as soon as June 2001. Furthermore, FERC's RTO rule (Rule 2000) establishes an expectation that all electric public utilities will be participating in operating RTOs by December 15, 2001."⁹ Staff Init. Comments, at 19-20. Additionally, although Staff

avers that "[t]ransmission operations create opportunities for an [IDC] to discriminate in favor of its own power sales," it does not describe those opportunities or explain why

⁹ FERC Rule 2000, at 665-672.

other IDC rules and FERC regulations will inadequately constrain them.

2.) Reducing the Bundled Service Monopoly

Staff's proposal includes two parallel ideas it calls Random Selection Block Bid Service ("RSBBS") and Competitive Choice Block Bid Service ("CCBBS"). The latter is a voluntary program; the former involves random assignment of customers. The Staff intention underlying both ideas is to "reduce the IDC's presence as a provider of power and energy service to retail customers in its service territory and to improve the level of competition to supply customers." Staff Reply Comments, at 14. Under the CCBBS proposal:

...an IDC's residential customers would be permitted to voluntarily enter into a pool. The right to supply the pool would be subject to bids by alternative suppliers. The bidder submitting the lowest bid that provides benefits greater than IDC service would win the right to supply the pool for a specified term. Only qualified alternative suppliers would be permitted to bid, and the IDC and its affiliates would be prohibited from bidding. A customer participating in the...program retains the right to switch to an alternate provider of its choice, including the IDC, at any time.

Id. Staff notes that PECO Energy Company, with whom ComEd's corporate parent has entered into a merger agreement, agreed to offer a program with these features (but with random customer selection, like an RSBBS).¹⁰ That program was approved by the Pennsylvania Public Utility Commission by an order issued on May 14, 1998. *Id.*, at 15.

Because Staff first presented these ideas in its reply comments, other parties (including the customers that would be Staff's intended beneficiaries) have not had the opportunity to consider their implications on the record. Moreover, the Commission is reluctant to address significant new market arrangements in the context of this rulemaking, particularly when is no need to adopt a market-sharing program as part of the "tradeoff" by which a utility elects IDC status. Since the incumbents have no "right" to all the generation customers in their service territories, Staff's proposals do not require a surrender of such rights by the utilities. Rather, Staff's ideas can stand or fall on their own merits in a docket established for that purpose.

Accordingly, the Commission affirmatively invites Staff or other interested parties to request initiation of a new proceeding to consider competition-expanding ideas such

¹⁰ Staff does not "directly" recommend adoption of an RSBBS because customers are selected randomly, but presents it as an example of the "creative programs" that could be adopted to promote competition for retail energy supply. Staff Reply Comments, at 17.

as Staff's CCBBS and RSBBS proposals. Because Staff has not yet taken a definitive position with respect to its own proposals,¹¹ we will not initiate a proceeding on our own motion at this time. The Commission prefers that Staff or others come forward with proposals to which they have made a clear commitment.

VI. THE COMMISSION'S APPROVED RULE

To accommodate the IDC option, the Commission has added Subpart B to Part 452. Consequently, it is necessary to revise Section 452.10 (the applicability provision of Subpart A) to explain how the subparts work together. This is the only revision of Subpart A approved by this Interim Order.

A. FUNCTIONALLY SEPARATED UTILITY RULES [Sections 452.20 - 452.180]

Section 452.10 Applicability

An electric utility shall be subject to Subpart A or Subpart B of this Part. Subpart A shall apply to each electric utility conducting operations in Illinois that is not otherwise approved to operate as an Integrated Distribution Company pursuant to Subpart B. Any electric utility subject to Subpart A whose principal service area is not in Illinois shall be exempt from Sections 452.30, 452.35, 452.40 and 452.60 and any other section of Subpart A wherein such exemption is expressly provided. Subpart B of this Part is an option available to electric utilities that elect to become subject to Subpart B and that are approved to operate as an Integrated Distribution Company pursuant to Subpart B.

Analysis

The Commission adopts Staff's draft of this provision, which slightly modifies ComEd's proposed language. ComEd states that it has no objection to Staff's changes. ComEd Reply Comments, at 31. Presumably as an oversight, both ComEd and Staff omitted Section 452.35 from the enumeration of those provisions that will not apply to utilities whose principal service territory lies in another state. We have corrected that oversight.

The Commission has not adopted Staff's proposed Section 452.210, which ComEd correctly describes as duplicative of this section. *Id.*

B. INTEGRATED DISTRIBUTION COMPANY RULES [Sections 452.200 - 452.360]

¹¹ For example, Staff does not indicate whether or how it expects the RSBBS and CCBBS proposals to co-exist in the generation market.

Section 452.200 Definitions

“Advertising” means any communication through any medium, except direct (e.g., in-person or telephonic) contact, for the purpose of requesting or retaining patronage from a customer or prospective customer.

“Company leadership” has the same meaning as in Subpart A of this Part.

“Delivery services” has the same meaning as in Section 16-102 of the Act [220 ILCS 5/16-102]; for purposes of this Subpart B, delivery services are transmission and distribution services.

“Electricity usage service” means any service, other than a transmission and distribution service, that involves or pertains to the usage or consumption of electricity by a retail customer.

“Integrated Distribution Company” means an electric utility that has completed implementation of an approved implementation plan pursuant to Section 452.220 of this Subpart B.

“Marketing” means direct contact with a customer or a prospect for the purpose of requesting or retaining patronage.

“Power purchase option” means the delivery services customer power purchase option in Section 16-110 of the Act [220 ILCS 5/16-110]; for purposes of this Subpart B, the power purchase option is retail electric power.

“Retail electric power” is electric power or energy sold at retail; for purposes of this Subpart B, retail electric power is an electric usage service.

“Transmission and distribution service” means any service provided by an electric utility’s transmission and distribution system.

“Transmission and distribution system” has the same meaning as in Subpart A of this Part.

“Value-added transmission and distribution service” has the same meaning as in Subpart A of this Part.

Analysis

The effectiveness of functional separation as a pro-competitive mechanism is

dependent upon the separate functioning of utility business units. In contrast, the effectiveness of the IDC option as a pro-competitive mechanism is dependent upon the withdrawal of the integrated utility from the energy market to the maximum allowable extent. Thus, functional separation focuses on structure, while the IDC rules focus on services. Accordingly, we have carefully defined the services that an IDC can and cannot provide, so that utilities, ARES and customers will have the clearest possible sense of what is permitted and what is prohibited.

In Subpart A, the Commission defines “generation services” to include the production, purchase, marketing and retail sale of electric energy. That broad definition is consistent with the intent of the FSU regime to separate the utility business units that make and sell power from the units that distribute power. Because this subpart controls what an IDC can and cannot sell, rather than its internal structure, a less expansive concept is required. The Commission does not need to control an IDC’s generation or purchase of electric power, but the services it offers at retail. Consequently, we include here a definition of “electricity usage service,” which encompasses any service that involves or pertains to the consumption of electric energy, but does not include power production, purchase, transmission or distribution. An IDC can provide no electricity usage service unless required to do so by law.

On the other hand, an IDC can offer any transmission and distribution service. It must, however, observe a bright line between such services and electricity usage services. Services with a significant association to electricity usage are not transmission and distribution services.

The Commission rejects ComEd’s proposed definition for “value-added services,” which appropriated the general definition of “competitive service” in Section 16-102 of the Act.¹² By borrowing the statutory phrase “other than tariffed services” for its definition, ComEd’s apparent intention is to cast all value-added services as competitive services, in order to sustain the argument that value-added services are not amenable to functional separation. That argument is irrelevant to the reopened portion of this proceeding (which is not a forum for re-arguing functional separation) and, indeed, is irrelevant to the functional separation adopted by this Order (which separates utility functions, not categories of service, as Section 16-119A requires). Accordingly, our approved definition of value-added services deletes ComEd’s reference to Section 16-102 and ComEd’s assumption that value-added services are, of necessity, non-tariffed. Furthermore, we see no reason to define the broad term “value-added services” when the focus of IDC operations should be on “value-added transmission and distribution services” (as discussed more fully in connection with Section 452.230, below).

Section 452.220 Integrated Distribution Company Implementation Plan

- a) To seek Commission approval to operate as an Integrated Distribution

¹² “‘Competitive service’ includes...(iii) services, other than tariffed services, that are related to, but not necessary for, the provision of electric power and energy.” 220 ILCS 5.16-102.

Company, an electric utility shall file a written plan by which it will implement, and affirm its commitment to comply with, the provisions of Subpart B. The implementation plan shall be sufficiently detailed so that the Commission can reasonably ascertain the systems, policies and practices that the electric utility will use to satisfy each of the requirements in Subpart B. The implementation plan shall include employee compensation, reward and penalty provisions designed to eliminate incentives, financial or otherwise, for Integrated Distribution Company employees, or for the Integrated Distribution Company, to contravene any provision of Subpart B. The implementation plan shall not be approved unless it demonstrates that the compensation changes, bonuses and career advancement of IDC employees are determined without taking into account revenues derived from electricity usage services.

- b) Within 45 days after an electric utility files an implementation plan with the Commission pursuant to subsection (a), the Commission shall approve, reject, or initiate a hearing to investigate, the implementation plan. If the Commission takes no such action within 45 days, the implementation plan shall be deemed approved. If the Commission initiates a hearing to investigate the implementation plan, intervention in accordance with 83 Ill. Adm. Code Part 200 shall be permitted. After such hearing, the Commission shall approve the implementation plan as filed or as modified by the Commission, or reject the implementation plan. In any order entered pursuant to this subsection, the Commission shall set forth its reasons for approving or rejecting an implementation plan. If its implementation plan is rejected by the Commission, a utility may not file another implementation plan within 180 days of a final order of rejection, without leave of the Commission.
- c) In any order rejecting an implementation plan, the Commission shall specify the date by which an electric utility shall be in compliance with Subpart A of this Part. Within 45 days after the entry of a final order approving an implementation plan, or within 45 days after the implementation plan is permitted to go into effect without a Commission order pursuant to subsection (b), an electric utility shall be in full compliance with all requirements of Subpart B. Upon written motion by a utility, and upon a finding of good cause, the Commission may grant additional time for achieving full compliance.
- d) An electric utility authorized by the Commission to operate under Subpart B may file a request to become subject to Subpart A of this Part. If the Commission finds such request to be in the public interest, the electric utility shall submit an implementation plan to comply with Subpart A. The Commission shall assess such implementation plan as provided by Section 452.170(b) of this Part. An electric utility proceeding under this subsection shall remain subject to all requirements of Subpart B until 60 days after the

Commission issues its final order pursuant to Section 452.170(b), unless the Commission otherwise orders.

- e) An electric utility authorized by the Commission under Section 452.170 to operate under Subpart A may file a request to become subject to Subpart B of this Part. If the Commission finds such request to be in the public interest, the electric utility shall submit an implementation plan to comply with Subpart B. The Commission shall assess such implementation plan as provided in subsections (b) and (c). An electric utility proceeding under this subsection shall remain subject to all requirements of Subpart A until 45 days after the Commission issues its final order pursuant to subsections (b) and (c) of this Section, unless the Commission otherwise orders.
- f) Each Integrated Distribution Company shall file with the Commission revisions to an approved implementation plan within 7 days of revision or at such time as designated by the Commission. The Commission may initiate a proceeding to disallow or modify any such revision; in such proceeding, the burden shall be upon the IDC to demonstrate that the revision is consistent with the provisions of Part B and the public interest.

Analysis

Both ComEd and Staff proposed provisions addressing the substance of this section. Subsection (a) of Staff's proposal contains a requirement that the utility include in its IDC implementation plan reward and penalty provisions "intended to address the IDC and IDC employee incentives to discriminate" and exploit prohibited opportunities. Staff Init. Comments, at 16. ComEd objects that Staff's recommendation "would result in utility employees' compensation packages being exposed to public scrutiny and decided by the Commission and third parties, rather than by the utility." ComEd Reply Comments, at 31. ComEd suggests "that instead the rule simply require an implementation plan to detail what steps a utility intends to take to eliminate incentives." *Id.*, at 32.

While the Commission concurs with ComEd that individual employee compensation packages should not be placed under public scrutiny for our purposes here, it is absolutely essential that such packages fully reflect an IDC's commitment to passive participation in the retail electricity usage market. Therefore, we have carefully delineated, in general terms, what a utility must demonstrate with respect to employee incentives before we will approve its IDC application. We are thus requiring a prospective IDC to show concretely that it is doing what ComEd states it is already

doing - adjusting employee compensation to reflect the corporate goal of exiting the retail energy market and "becoming a top-flight distribution company." ComEd Reply Comments, at 29.

We recognize that IDC employee incentives cannot be entirely separated from the performance of the whole utility and its corporate family. Stock options are a customary component of compensation packages and establish apt incentives for corporate employees. Still, according to Dr. Edward Zajac, a Northwestern University professor who provided a sworn statement in support of ComEd's proposal, if the issue "is whether incentives within ComEd can be used to minimize ComEd employees' corporate-wide focus, the answer is an unequivocal yes." ComEd Reply Comments, Attach. F. In Dr. Zajac's view, corporate-wide focus is diminished when employees "are rewarded more significantly for the performance of their business units...than for overall corporate performance." *Id.* Within ComEd, Dr. Zajac stated, "financial incentives for their managerial employees is [sic] typically weighted as follows: 75% for BU [business unit] performance and only 25% for overall corporate performance." *Id.*

However, while Dr. Zajac identifies ComEd's business units as "delivery services" and "generation services," an IDC would integrate employees from both of those units in a single organization. Therefore, to apply Dr. Zajac's reasoning, employee rewards within the integrated company would have to be aligned solely with the distribution function (since, as Dr. Zajac point out, ComEd's "corporate strategy is explicit in focusing on delivery services and not generation services"). *Id.*

Accordingly, subsection (a) precludes an IDC from basing employee compensation, bonuses or career advancement on the IDC's performance with respect to electricity usage services. With this prohibition, the Commission avoids micro-managing what *will* be part of IDC compensation packages, while determining what will *not* be if a utility is to be accorded IDC status. Our interest is not in managing employee compensation, but it minimizing incentives that would potentially jeopardize the development and sustainability of efficient competition.

Subsection (b) includes Staff's recommended limitation on the time for Commission consideration of an implementation plan. ComEd agrees that this will "prevent the utility from being in limbo." ComEd Reply Comments, at 32.

Staff recommends that we reject an implementation plan in its entirety only for bad faith or patent insufficiency. Staff Init. Comments, at 16. Although this recommendation was intended to give us flexibility, we find that it has the opposite effect. The Commission must be able to reject an implementation plan that does not meet our requirements, irrespective of the existence of bad faith or patent insufficiency. So that no applicant can "game the Commission's processes" in bad faith, as Staff cautions in its Initial Comments at page 16, our subsection (b) provides that a new implementation plan cannot be filed within 180 days of a rejection without leave of the Commission.

Subsection (b) also incorporates ComEd's request that the Commission state its reasons for rejecting an implementation plan. ComEd Reply Comments, at 32. This is plainly fair and will facilitate corrective action by the utility or further review of our

decision.

Subsection (c) allows a utility 45 days to achieve compliance with its approved implementation plan, as proposed by Staff. ComEd objects that this is not a sufficient compliance period and requests 60 days. ComEd Reply Comments, at 33. The Commission observes that since the utility determines when to submit its IDC implementation plan, it can wait to make its submission when it is likely to meet the 45-day requirement. Nevertheless, for balance, we have also adopted ComEd's suggestion that a utility be permitted to seek a compliance extension for good cause. ComEd Reply Comments, at 33-34.

In subsections (d) and (e), we identify procedures by which a utility may seek to alter its status as, respectively, an IDC or a functionally separated utility. The Commission emphatically rejects ComEd's argument that such alteration is simply a "business decision." *Id.*, at 34. The regulatory status of the sole provider of transmission and distribution within a service territory can have substantial impact upon the public interest.

Subsection (f) requires that revisions to implementation plans be filed with the Commission. We also reserve the right to initiate a proceeding regarding such revisions.

Section 452.230 Permissible and Impermissible Integrated Distribution Company Services

- a) An Integrated Distribution Company may provide transmission and distribution (including delivery services), all tariffed services required by the Act (including the power purchase option), value-added transmission and distribution services, and billing and pricing experiments for transmission or distribution services. An Integrated Distribution Company may also enter into contracts with end-user customers for load curtailment, and contracts with power producers for standby services, auxiliary services, or transmission and distribution services pertaining to maintenance. Any service offered by an Integrated Distribution Company, whether by tariff or contract, shall be made equally available to all eligible customers. An Integrated Distribution Company shall not offer or provide retail electricity usage services, except as allowed by this section.
- b) Beginning on the day it files a written implementation plan under Section 452.220(a), an Integrated Distribution Company shall not, notwithstanding Sections 16-102, 16-116(b), and 9-102.1 of the Act [220 ILCS 5/16-102, 5/16-116(b), and 5/9-102.1], enter into any contract for the provision of any retail electricity usage service. An IDC shall not renew, extend, or renegotiate any existing contract for any electricity usage service, except to the extent that the Integrated Distribution Company is contractually bound to

renew, extend, or renegotiate at the customer's option and the customer has exercised its option. At the request of the Commission, an Integrated Distribution Company shall make available for inspection by the Commission any or all existing contracts for the provision of any electricity usage service. The Commission shall treat all such contracts confidentially and shall enter such contracts into the record in any proceeding before the Commission subject to a reasonable confidentiality agreement.

- c) An Integrated Distribution Company shall not, through the offering or provision of any contract, billing or pricing experiment, or value-added transmission or distribution service, provide an inducement to stay on, switch back to, or purchase, any electricity usage service. An Integrated Distribution Company shall not offer or provide a discount on retail electricity usage service in connection with any contract, (except for contracts permitted under subsection (b)), billing or pricing experiment, or value-added transmission or distribution service.

Analysis

This provision addresses the substance of subsection 452.190(a) of ComEd's IDC proposal and Sections 542.230 and 452.240 of Staff's IDC proposal. Permissible IDC services are described in subsection (a) and discussed in detail below.

Billing and pricing experiments - Staff recommends against including new billing and pricing experiments among permissible IDC service offerings. Staff Init. Comments, at 17. Staff asserts that the Commission has already found billing and pricing experiments to be "explicitly discriminatory." *Id.*, at 17-18 (citing the Illinois Commerce Commission Report to the General Assembly: Experimental Programs Initiated by Electric Utilities under Section 16-106 of the Electric Service Customer Choice and Rate Relief Law of 1997 ("Experimental Programs Report")). C&GP propose that we "require Commission approval of all billing and pricing experiments." C&GP Init. Comments, at 5.

While Staff is correct that the Commission characterized billing and pricing experiments as discriminatory, we did so in the context of describing what is *condoned* by Section 16-106 of the Act. Experimental Programs Report, at 18. Section 16-106 permits a utility to offer experiments "at its discretion" during the mandatory transition period, without creating "any right in any other retail customer or group of customers to participate in the same or a similar program." 220 ILCS 16-106. Consequently, the Commission lacks authority to prohibit or require approval of billing and pricing experiments.

However, in ComEd's view, a utility can voluntarily relinquish statutory rights in return for IDC status. Indeed, by limiting an IDC to "distribution-related" billing experiments, ComEd applies that principle directly to a utility's Section 16-106 rights,

which contain no such limitation.¹³ The question, therefore, is whether the Commission should either remove all billing and pricing experiments (not just generation-related experiments) from the list of permissible IDC services or require Commission approval before an IDC can offer even a distribution-related experiment.

Staff casts the debate in terms of system integrity and reliability and avers that these objectives can be achieved with load interruption and curtailment contracts rather than billing and pricing experiments. Staff Init. Comments, at 17. ComEd responds that an “advantage of using billing and pricing experiments for load curtailment is that the rates and terms will then be a matter of public record...By contrast, the terms and conditions of contracts for load curtailment generally would not be publicly available.” ComEd Reply Comments, at 36.¹⁴

The Commission concludes that a complete prohibition on billing and pricing experiments is not required when anti-competitive behavior can be satisfactorily controlled by requiring an IDC to concentrate on its transmission and distribution services and refrain from offering electricity usage services not required by statute. Accordingly, we will limit permissible experiments to distribution services, rather than to the broader universe of “distribution-related” services¹⁵. Any involvement of electricity usage services in connection with such experiments must be ancillary, minimal and not reasonably avoidable.

The C&GP warn that an IDC will “cherry pick customers to remain with the company for generation in exchange for participation in a billing and pricing experiment.” C&GP Init. Comments, at 4. With particular reference to load curtailment experiments, ComEd responds that “[a]ny price break, such as it is, is contingent on actual curtailment by the customer when requested.” ComEd Reply Comments, at 37. Therefore, ComEd maintains, participation in a load curtailment experiment confers no special benefit on the customer.

The Commission agrees that an IDC should have no significant ability to leverage its transmission and distribution monopoly to obtain, retain or recapture customers for its electricity usage services. This objective will be more attainable if billing and pricing experiments for transmission and distribution services were

¹³ Nevertheless, in response to C&GP’s proposal to require approval of billing and pricing experiments, ComEd argues - curiously - that a utility cannot be required to surrender statutory rights in return for IDC status. ComEd thus picks and chooses among those rights that it will waive and reserve, alternately citing the same judicial precedents in support of its preferences and against its opponents. ComEd cannot have it both ways. The Commission believes, as previously discussed, that our authority to entertain ComEd’s own IDC proposal is based on the principle of voluntary waiver - a principle that extends to any statutory right a utility has under the Act.

¹⁴ ComEd’s proposed rule is not limited to distribution-related experiments pertaining to load curtailment. Any distribution-related experiment would be permitted.

¹⁵ IIEC argues that the term “distribution-related” is so broad that the Commission would have “a very difficult time” identifying any billing or pricing experiment “that does not meet this expansive definition.” IIEC Init. Comments, at 10.

comparably available to any customer meeting the criteria associated with such experiments, irrespective of the identity of the customer's retail electric power provider. Significantly, CILCO, an incumbent electric utility and potential IDC, proposes that "any billing experiment offered to bundled customers by an IDC shall be offered under the same terms and conditions and at the same time to delivery service customers."¹⁶ CILCO Init. Comments, at 2. NewEnergy, an alternative energy provider, concurs. NewEnergy Init. Comments, at 2. ComEd has apparently moved in this direction, having "introduced a billing and pricing experiment which will enable ARES to provide load curtailment services to their customers should they choose to do so." ComEd Reply Comments, at 37.

Therefore, the Commission will make comparability mandatory. IDC billing and pricing experiments for transmission and distribution services are permissible only when participation is comparably available to *any* customer meeting the requirements of those experiments.¹⁷ ComEd aptly describes our intended result - that "there should be *no* incentive for any customer to continue to purchase retail electric supply service from an IDC based upon an IDC's offering distribution-related billing and pricing experiments." *Id.* (emphasis in original).

Contracts - The principles discussed in connection with billing and pricing experiments are pertinent to IDC transmission and distribution services contracts as well. Under ComEd's proposed subsection 452.200(d), an IDC could enter into contracts regarding "load curtailment, or contracts with power producers for services such as standby services, auxiliary services and maintenance services." Although Staff's proposed rule would allow customer contracts for load interruption/curtailment and other distribution services, they would have to be "offered under tariffs on file with the Commission." Staff Init. Comments, at 20. Moreover, Staff would bar non-tariffed contracts with power producers for stand-by and auxiliary service, because they "appear to constitute power and energy services and, therefore, should not be exceptions to the general prohibitions" on new non-tariffed electric power contracts. *Id.* The IIEC echo Staff's position, asserting that standby and auxiliary power services are "inextricably related to generation." IIEC Init. Comments, at 10.

ComEd agrees that load curtailment and standby services "inherently contain a generation component," but argues that it is more important to focus on the purpose of such services - "to promote the integrity and reliability of the distribution system for all users, including ARES and their customers." ComEd Reply Comments, at 39. "[B]y providing standby service contracts to independent power producers, an IDC *facilitates*

¹⁶ CILCO also asserts that such experiments should "have the same economic value for delivery services customers as for bundled customers." CILCO Init. Comments, at 2. However, since CILCO offered no definition of "economic value," and no explanation of how to ascertain equivalence, the Commission makes no conclusions regarding this assertion.

¹⁷ The Commission recognizes that some billing and pricing experiments involve a finite and predetermined number of customers. Our rule requires comparability of opportunity to participate in such experiments and is not intended to enlarge the number of participating customers.

market entry in generation, thereby directly promoting competition.” Id., (emphasis in original). ComEd adds that “such services are required to be offered to [qualifying facilities] under PURPA.¹⁸

The Commission concludes that end-user contracts pertaining to load interruption and curtailment, and contracts with power producers for stand-by services and auxiliary power, are transmission and distribution services and are beneficial to system reliability. The relationship of such services to generation is not determinative since, as the IIEC themselves argue in various ways in their comments, virtually every service offered by an electric utility is related in a greater or lesser degree to every other service. The more important issues are the essential purpose and market significance of a service. Interruption and curtailment are essentially for system management, while standby and auxiliary power services enable alternate providers to serve end-users.

However, as with billing and pricing experiments, IDC load interruption and curtailment contracts must be available on a comparable and non-discriminatory basis to any customer, irrespective of the identity of the customer’s retail electric power supplier, while standby and auxiliary power services must be offered without discrimination among power providers. We will not, though, require that such contracts be provided pursuant to tariff, as Staff recommends. Although we reject ComEd’s contention that approval of IDC status cannot be conditioned upon voluntary acceptance of a tariff requirement by the utility, ComEd Reply Comments, at 38-39, Staff has not demonstrated the benefit of a tariff.

Value-added services - Per ComEd’s proposed subsection 452.190(a), an IDC can provide “value-added services.” However, ComEd’s proposed subsection 452.200(e) addresses the narrower category of “value added services related to [an IDC’s] role as a distribution provider.” The broader language in proposed subsection 452.190(a) is unacceptable because it does not limit the IDC to its ostensible purpose and emphasis as a distribution company. The language of proposed subsection 452.200(e) is more appropriately directed at distribution, but invites disputes concerning what is “distribution-related.” Consequently, the Commission will restrict IDCs to offering “value-added transmission and distribution services.” Furthermore, as with billing and pricing experiments and contracts pertaining to transmission and distribution services, the relationship between value-added transmission and distribution services and electricity usage services must be ancillary, minimal and not reasonably avoidable.

Additionally, an IDC must make its value-added transmission and distribution services available to any customer, without regard to the identity of the customer’s retail electric power provider. Although ComEd maintains that it has “expressly stated”

¹⁸ 16 U.S.C. sec. 824a-3.

its intention to do so, ComEd Reply Comments, at 21, that requirement does not appear in ComEd's proposed IDC rule. Accordingly, we include that requirement here. Again, our intention is to have the IDCs operate as neutral transmission and distribution providers to the extent permitted by the Act.

Although NAESCO does not explicitly say so, it apparently regards the energy services offered by its member companies as equivalent to some or all of what ComEd characterizes as value-added services. From that perspective, NAESCO initially opposed ComEd's IDC proposal in its entirety, arguing, among other things, that Commission approval would in some fashion constitute an assertion of jurisdiction over energy services, NAESCO Init. Comments, at 5, and a subsidy for the utility's energy services "function." *Id.* NAESCO indicates that it might withdraw its opposition if IDCs were limited to providing tariffed electric power and required to submit to an evidentiary hearing before offering other products. NAESCO Reply Comments, at 4. NAESCO's desired outcome is that an IDC would have to prove that its own energy services "would not harm the development of the competitive energy services market." *Id.*

Assuming, for purposes of NAESCO's argument, that energy services and value-added transmission and distribution services overlap, the Commission nevertheless declines to include withdrawal from the value-added transmission and distribution services market in the "tradeoff" for IDC status. These are appropriate offerings by a transmission and distribution company. When offered on a non-discriminatory basis, and without superior access to transmission and distribution system information, they expand the range of customer choice.¹⁹

Furthermore, we have no jurisdiction over the energy services market, as NAESCO recognizes. NAESCO Init. Comments, at 4. Our objective is to preclude the incumbents from leveraging their value-added transmission and distribution services to frustrate competition in the intra-state energy market, over which we do have jurisdiction. Accordingly, an IDC will be allowed to offer value-added transmission and distribution services, but must do so without discrimination and without first use of transmission and distribution system information (see, Section 452.260, below).

Subsection (b) prohibits all new IDC contracts for the provision of any electricity usage service. Renewal, extension or renegotiation of an existing contract is barred unless required by the customer pursuant to the terms of that contract.

Section 452.240 Advertising, Marketing, and Customer Retention Efforts

- a) An Integrated Distribution Company shall not advertise or market with regard to the offering of any electricity usage service.

¹⁹ Indeed, there may be value-added distribution services that can only be offered by the distribution company.

- b) The advertising and marketing prohibition of subsection (a) shall not preclude an Integrated Distribution Company from: (1) advertising or marketing distribution services; (2) using the electric utility company corporate name and logo in connection with the offering or provision of permissible Integrated Distribution Company services; (3) engaging in advertising or marketing generally promoting the public image and good will of the Integrated Distribution Company as a provider of transmission and distribution; (4) meeting its obligations for consumer education programs as set forth in Section 16-117 of the Act [220 ILCS 5/16-117], or otherwise engaging in legitimate consumer education efforts; or (5) meeting the customer notification requirements specified in Section 16-110 [220 ILCS 5/16-110] for the power purchase option.
- c) No Integrated Distribution Company employee or agent shall state or imply that access to or quality of service for delivery of electricity is, or will be, better if the customer retains, switches to, or otherwise obtains any electricity usage service from the Integrated Distribution Company.
- d) No Integrated Distribution Company employee or agent shall affirmatively prompt customer inquiries about the quality of the Integrated Distribution Company's electricity usage services. No Integrated Distribution Company shall disparage the quality of an alternative retail electric supplier's electricity usage services.
- e) No Integrated Distribution Company employee or agent shall affirmatively act to retain or obtain a customer for any electricity usage service offered or provided by the Integrated Distribution Company.

Analysis

This section draws from Staff's proposed Section 452.250 and ComEd's proposed Section 452.210. Subsection (a) reflects our intention to require an IDC to participate passively in the electricity usage services market. Advertising and marketing of electricity usage services, including statutorily-mandated bundled retail electric power and the PPO, are strictly forbidden.

The C&GP recommend that we ban image advertising by the IDCs. C&GP charge that ComEd has not met its "burden of persuasion that the company's image advertising program will not affect customer retention [for generation services]." C&GP Reply Comments, at 4. C&GP assert that their own affiant, Aleen Bayard, an advertising consultant, has demonstrated that image advertising *is* a customer retention mechanism. C&GP Init. Comments, at 2. C&GP also question the need for image advertising when the utilities will continue as sole providers of transmission and distribution in their respective territories. C&GP Reply Comments, at 4. As an

alternative to an advertising ban, C&GP recommend that we “require an IDC to allocate 50% of its marketing budget towards promoting customer choice.” ComEd Init. Comments, at 3.

In response, ComEd avers that C&GP’s proposed ban would fail the test established for constitutional restraints on commercial speech in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 24, 65 L.Ed.2d 341 (1980). ComEd Reply Comments, at 8. Furthermore, ComEd maintains, image advertising by an IDC “could be quite important to economic development in its service territory,” insofar as energy-conscious businesses would be favorably disposed to locating there. *Id.*, at 9. ComEd contends that all energy providers, not just the incumbent utilities, benefit from such business growth. *Id.*, at 10.

The Commission agrees with ComEd that image advertising is appropriate and potentially beneficial for all energy providers. However, the C&GP are correct that image advertising should not be used to promote or retain energy customers. A basis for reconciling these positions is suggested by the parties themselves. C&GP state that an IDC “could do targeted ads aimed directly at commercial customer [sic] that focus on reliability.” C&GP Init. Comments, at 2. ComEd states that its image advertising “will be related to the utility’s *distribution* business, not the retail supply business.” ComEd Reply Comments, at 11 (emphasis in original). ComEd supports this assertion with the opinion of its affiant, Mitchell Engel, a marketing consultant, who concludes that, “[I]t is in transmitting and distributing electrical power that ComEd would have sensed the need...for corporate image advertising in the first place.” ComEd Reply Comments, Attach. B, at 6-7.

Accordingly, in subsection (b), the Commission approves image advertising for the IDCs as transmission and distribution companies. This does not include image advertising for the IDC as a corporate whole, which would inherently benefit the IDC’s electricity usage services. Rather, subsection (b) requires that advertisements promoting the general image of the IDC must clearly and solely pertain to the attributes of a distribution company. Subsection (b) thus reflects ComEd’s conception of the IDC as a utility that “focus[es] its resources and business strategy on its distribution business...and...[does] not actively compete in the retail electric supply market.” ComEd Init. Comments, at 4.

Subsection (d) includes a ban on customer prompting, as proposed by Staff and ComEd. Subsection (d) also prohibits disparaging representations regarding the quality of competing electricity usage services. As sole source provider of distribution, IDC employees will have frequent and exclusive opportunities to dissuade customers from using alternate energy sources. Competition will not thrive if those opportunities are exploited. In response to customer-initiated queries, IDC employees can refer customers to this Commission or to unaffiliated agencies and organizations for information about the IDC’s competitors.

Subsection (c) is derived from Staff's proposed subsection 452.250(c) and ComEd's proposed Section 452.260, which do not materially differ. Subsection (e) is a provision proposed by Staff and supported by ComEd. ComEd Reply Comments, at 40-41.

Section 452.250 Integrated Distribution Company Rate and Price Conditions

- a) An Integrated Distribution Company shall not change its tariff to reduce the price for any tariffed service pursuant to Section 16-111(f) of the Act [220 ILCS 5/16-111(f)], but may change its tariff to reduce rates for such services in the manner provided in Article IX of the Act [220 ILCS 5/9-201, *et seq.*], and as provided in subparagraphs (1) through (4) of subsection (a) of Section 16-111(a) of the Act [220 ILCS 5/16-111(a)(1)-(4)].
- b) An Integrated Distribution Company providing bundled retail electric power to customers eligible for delivery services under Section 16-104 of the Act [220 ILCS 5/16-104] shall separately state on the customer's bill the price of the components of that tariffed service that would be: 1) subject to the Federal Energy Regulatory Commission's transmission rate authority if the bundled retail electric power were being provided as an unbundled service; and 2) subject to the Commission's delivery services rate authority if the bundled retail electric power were being provided as an unbundled service.

Analysis

Subsection (a) incorporates elements of Staff's proposed subsection 452.260(e) and ComEd's proposed subsection 452.200(b).

Subsection (b) requires the IDC to place certain information on the bills of customers eligible to select delivery services, as recommended by Staff. We agree that this will provide customers with "necessary information to make educated decision about power supply options." Staff Init. Comments, at 26. The Commission rejects ComEd's argument that this requirement will somehow make bundled electric power service "inconsistent with" that service as it was provided in 1997.²⁰ ComEd Reply Comments, at 48-49. We do not believe the Legislature would regard additional customer education as inconsistent with former practice regarding bundled electric power service. The Act was revised to expand customer choice, not to limit the information available to customers.

Additionally, we find that ComEd misconstrues the transcript in these proceedings, insofar as it claims that Staff witness Rismiller testified that billing statements for bundled customers could not be supplemented under the Act. *Id.*, at 49 (citing Tr. 1325-26). Mr. Rismiller merely affirmed that bills were one element of the

²⁰ Subsection 16-103(c) of the Act obligates the utilities to furnish bundled service in a manner "consistent with" that service as it was provided when the Act was amended in 1997. 220 ILCS 5.16-103(c).

service that must remain “consistent with” prior service. The fact that he proposed the substance of subsection (b) supports our conclusion that ComEd has misinterpreted his testimony.

We decline to adopt Staff’s proposed subsection 452.260(a), which would authorize the Commission to restructure or unbundle an IDC’s tariffed rates pursuant to Article IX of the Act and “notwithstanding Section 16-111(a) of the Act.” Although Staff characterizes that provision as “necessary to address the opportunities and incentives that an IDC will have to discriminate,” Staff Init. Comments, at 24, it does not explain that assertion. Consequently, the Commission cannot discern why the unbundling authority conferred by Section 16-109A of the Act would not be sufficient.

The Commission will also not approve Staff’s recommended subsection 452.260(b), which would require an IDC to take transmission service under applicable FERC tariffs when providing bundled retail electric power. ComEd is correct that this proposal resurrects a recommendation that we have rejected in connection with our functional separation rules and standards of conduct under Subpart A of these rules. ComEd Reply Comments, at 48.

More importantly, however, the Commission is unwilling to include Staff’s proposal in the “tradeoff” associated with IDC status. This docket is not about ratemaking, but about preventing the utility from exploiting IDC status to frustrate competition. Accordingly, this section prevents manipulation of bundled retail electric power rates to retain or recapture customers, but does not determine the components of those rates. Furthermore, assuming Staff correctly describes the utility’s commitments with respect to the Midwest ISO agreement, the utilities will take transmission service pursuant to a FERC transmission tariff without further action from this Commission. Staff Init. Comments, at 25.

Section 452.260 Comparability of Access to Transmission and Distribution System Information - Integrated Distribution Company Internal Information Transfer Conditions

- a) The transmission and distribution system information covered by this Section shall include transmission or distribution construction plans, transmission or distribution abandonment plans, planned transmission or distribution system upgrades, downgrades, or modifications, planned transfer or sale of transmission or distribution facilities, transmission or distribution maintenance or outage plans or schedules, transmission or distribution forced outage data, historic transmission or distribution outage and restoration data, availability of transmission capacity, transmission or distribution facilities ratings, availability of value-added transmission and distribution services, forecasted or scheduled new customer interconnection information, and customer emergency curtailment information and any other transmission and distribution information that directly affects the availability or quality of the transmission and distribution system.

- b) Within 24 hours of the acquisition of the information described in subsection (a) by IDC company leadership, an IDC shall post such information on an internet site pre-specified and publicized as provided in subsection 452.80(e) of SubPart A of this Part, and shall also provide such information by fax to all non-affiliated ARES and persons with valid standing requests as provided in subsection (c) of this section. The electric utility shall keep a log listing and describing all such instances. The log shall be available for Commission inspection and shall be made available to the public upon request. Entries in the log shall be retained for three years.
- c) Any non-affiliated ARES or any customer may submit to the person in charge of the electric utility's transmission and distribution system a written standing request for the information to be provided under subsection (b). In acknowledging receipt of such standing requests, each electric utility shall inform the requester of the internet site where the information to be provided under subsection (b) can be found. Standing requests made pursuant to this subsection shall expire one year after being received by the person in charge of the electric utility's transmission and distribution system unless renewed in writing by the non-affiliated ARES or customer. Provided that an electric utility publicizes the internet location for the information to be provided under subsection (b), the standing request option in this subsection (c) shall expire three years from the effective date of this Part.
- d) Access by Integrated Distribution Company employees to the information described in subsection (a) shall be limited to the maximum practical extent until such information is posted on the internet site described in subsection (b). No Integrated Distribution Company employee or agent shall use any information described in subsection (a) to sell, promote, market, advertise, or describe to any customer or prospective customer any service provided by the Integrated Distribution Company until such information is posted on the internet site described in subsection (b).

Analysis

This section adapts certain requirements from subsection 452.80 of Subpart A of these rules, as well as certain elements in Staff's proposed section 452.270. As discussed in Section V., Part B of this Order, the Commission finds that comparable access to transmission and distribution system information for all energy providers will be essential when IDCs are allowed to operate without comprehensive internal information restrictions. With prior or superior access to transmission and distribution system information, the incumbent can make business plans, prepare marketing and advertising, initiate customer contacts and prepare for system changes well before competing energy suppliers became aware that such changes are approaching. This first-to-market advantage would inure to the utility solely because of its exclusive role

as transmission and distribution provider in its traditional service territory.

ComEd argues that a section like this one assumes that “the utility’s retail arm will use the information in question to market retail electric supply.” ComEd Init. Comments, at 32. Because, in ComEd’s view, that assumption is invalid, “there is no need for the rule.” *Id.* ComEd’s argument does not address the substantial competitive concerns described in the preceding paragraph. Although limitations on the promotional use of systemic information are important - and, accordingly, are imposed by subsection (d) - such limitations neither constrain the incumbents’ unique opportunity to move first in the marketplace nor provide alternate providers with information vital to business planning.

Section 452.270 Information From Customers and Others - Provided to the Integrated Distribution Company By An Affiliated or Non-Affiliated ARES, Customer of Affiliated or Non-Affiliated ARES, or Retail Customer of the Integrated Distribution Company

- a) The information covered by this Section shall include any data or information provided to the Integrated Distribution Company in its role as a provider of transmission and distribution by an affiliated or non-affiliated ARES, customer of an affiliated or non-affiliated ARES, or retail customer of the utility.
- b) No Integrated Distribution Company employee shall use the information described in subsection (a) to sell, promote, market or advertise any electricity usage service or to attempt to obtain or retain any customer for any electricity usage service; provided that Information received from a retail customer of the Integrated Distribution Company that is necessary to the continued provision of a permissible IDC retail electric power service to that customer may be used by the Integrated Distribution Company for that purpose.

Analysis

This section is derived from ComEd’s proposed Section 452.240 and is intended to restrict IDC use of information received from customers, competitors and affiliates to sell or promote electricity usage services, including permissible IDC retail electric power services. However, information necessary to the continued provision of a permissible IDC retail electric power service to an IDC customer can be used accordingly.

The Commission has broadened ComEd’s proposed language to include information derived from the IDC’s role as transmission and distribution provider, rather than from its narrower role as delivery services provider. Similarly, while ComEd only addresses information supplied by a customer eligible for delivery services, subsection (a) applies to information from any IDC customer. By the time these rules take effect

after legislative review, all non-residential customers will be eligible, or approaching eligibility, for delivery services. Since marketing, customer retention and customer acquisition efforts regarding these customers will commence before their eligibility, the use of information will be proscribed under subsection (b) whenever a utility becomes an IDC.

Section 452.280 Tying

An Integrated Distribution Company shall not tie, as defined by state and federal anti-trust laws, the provision of any tariffed service to the taking of any other product or service offered or provided by the Integrated Distribution Company.

Analysis

Both ComEd (proposed Section 452.250) and Staff (proposed Section 452.280) recommend anti-tying provisions. The Commission adopts Staff's broader recommendation, to preclude tying a tariffed service to any other service.

Section 452.290 Integrated Distribution Company Transmission and Distribution Services

- a) All requests for transmission and distribution services shall be processed in a non-discriminatory manner.
- b) An Integrated Distribution Company shall strictly enforce all tariff provisions relating to transmission and distribution services if these tariff provisions do not provide for the use of discretion.
- c) If provisions of transmission and distribution services tariffs allow for discretion, an Integrated Distribution Company shall apply these tariff provisions in a fair, impartial and non-discriminatory manner. Similarly situated transmission and distribution services users or potential transmission and distribution services users shall be treated equally.
- d) An Integrated Distribution Company shall not discriminate in matters relating to curtailment, interconnection, service restoration, repair work, transmission and distribution upgrading, scheduling, priority, balancing, or transmission and distribution services availability, price or service quality.
- e) If an Integrated Distribution Company offers or attributes a rate discount, rebate, or fee waiver on delivery services or other transmission and distribution services to customers of its permissible electricity usage services, it shall also offer the same discount, rebate, or fee waiver to all alternative retail electric suppliers or customers of alternative retail electric suppliers. The Integrated Distribution Company shall maintain a log of all such discounts, rebates, or fee waivers granted. The entry in the log shall be

made within 24 hours of the time the transmission and distribution services transaction commences. The entry in the log shall be maintained for one year after such discount, rebate, or fee waiver expires. The log shall be available for Commission inspection. The log shall be made available to the public upon written request.

Analysis

This provision is derived from Staff's proposed Section 452.90 and ComEd's proposed Section 452.80, which are substantially similar. This section will apply to all transmission and distribution services offered by the IDC, rather than to delivery services in particular. Similarly, subsection (e) will apply to customers of any permissible IDC electricity usage service, rather than the PPO alone. These revisions conform this section to our intention to require IDCs to operate to the maximum extent as passive generation suppliers and neutral transmission and distribution providers.

Section 452.300 Personnel Transfers

Employment transfers of Integrated Distribution Company employees and agents shall not be used or allowed to circumvent any provision of Section 452.260 of this Part.

Analysis

ComEd offered its proposed Section 452.230 to address potential information transfer issues that might arise from personnel transfers within the IDC. Since the IDC will not be required to divide its business units in the manner of a functionally separated utility, ComEd presented this provision in "what may be an excess of caution." ComEd Init. Comments, at 29. Staff characterized ComEd's proposal as containing "no restrictions on the flow of information" within the IDC. Staff Reply Comments, at 25. From that premise, Staff concluded that a personnel transfer provision would be unnecessary. *Id.*

Although it is not literally correct that ComEd's proposal contained "no restrictions" on information transfers, those restrictions were indeed minimal and may not have justified a rule concerning personnel transfers. However, subsection 452.260(d) adopted today does contain an important transfer restriction regarding transmission and distribution system information. Consequently, the Commission has adopted this section.

Section 452.310 Emergency Exception

- a) In anticipation of impending emergencies and in times of actual emergency affecting the public health and safety or electric system integrity and reliability, an Integrated Distribution Company may take any actions necessary to protect the public and the electric system. If under normal non-emergency circumstances, those actions would constitute violations of this

Part, the Integrated Distribution Company shall file written reports as specified below.

- b) Within 24 hours of initiating reliance on the authority in subsection (a), an Integrated Distribution Company shall: 1) file an initial written report with the Commission, describing, and stating the general reasons for, such action; and 2) notify non-affiliated ARES on the internet site described in subsection (e) of Section 452.80 of this SubPart A of this Part.
- c) Within seven days of initiating reliance on the authority in subsection (a), or within two days of terminating reliance on the authority in subsection (a), whichever is later, the Integrated Distribution Company shall file a full written report with the Commission, explaining the nature and extent of the emergency and how and why the emergency arose. This report shall also list and describe each action the electric utility took which, under non-emergency circumstances, would constitute a violation of this Part. The initial and full written reports shall be available to the public on the internet site described in subsection (e) of Section 452.80 of this SubPart A of this Part.
- d) Nothing in this Section shall preclude the Commission from investigating, upon its own motion, or upon complaint by any person pursuant to Section 452.330 of this Part, whether the actions or omissions of an Integrated Distribution Company pursuant to subsection (a) were reasonably related to an impending or actual emergency affecting the public health and safety or electric system integrity or reliability. If, after a hearing, no such reasonable relationship is found, the Commission may impose one or more penalties as authorized by Section 452.350 of the Part.

Analysis

Subsections (a) through (d) of this provision mirror ComEd's proposed Section 452.220, which replicates the emergency provision in Section 452.50 in Subpart A of these rules. Staff contends that an emergency provision is unnecessary in Subpart B because an IDC will not need to bypass the functional separation and information restrictions included in Subpart A. Staff Reply Comments, at 24. Moreover, Staff asserts an IDC "must provide non-discriminatory service both in emergencies and non-emergencies." *Id.* The latter argument is correct but not a sufficient rationale for omitting an emergency provision from these rules. Public safety and system reliability are simply too important. However, the Commission has added subsection (e) to make non-discriminatory implementation of this section more likely.

Section 452.320 Cross-subsidization

No Integrated Distribution Company shall use public utility business to subsidize

non-public utility business. Accordingly, the Integrated Distribution Company shall comply with the requirements of the Commission's rules regarding accounting for non-public utility business of electric utilities (83 Ill. Adm. Code 416), the Uniform System of Accounts (83 Ill. Adm. Code 415), and such orders of the Commission under Section 7-102 of the Act [220 ILCS 5/7-102] as may be applicable.

Analysis

This provision essentially mirrors Staff's proposed subsection 452.300(a) and ComEd's proposed Section 452.290. Staff propose two additional subsections, adapted from Section 452.135 of Subpart A of these rules, to prohibit cross-subsidization of "retail power services" by delivery services and to require internal biennial audits to measure compliance with that prohibition. Staff supports those additional subsections with the bare assertion that cross-subsidization "within an IDC is just as much concern as cross-subsidization within functionally separated electric utilities." Staff Init. Comments, at 30. ComEd responds that "such provisions have no proper application to an IDC, which does not have separation between delivery services and generation services." ComEd Reply Comments, at 44. The Commission agrees with ComEd. In view of the service limitations that a utility will accept in return for IDC status, and in view of the absence of functional separation, the usefulness of additional accounting is not apparent to the Commission.

Section 452.330 Formal Complaint Procedures

Complaints alleging violation by an Integrated Distribution Company, its employees or agents of any provision of Subpart B shall be filed pursuant to 83 Ill. Adm. Code 200. Nothing in Section 452.340 shall impair any person's right to bring a claim under this Section.

Analysis

This provision incorporates ComEd's proposed Section 452.300 and Staff's proposed Section 452.310, which are identical in substance.

Section 452.340 Informal Dispute Resolution Procedures - Integrated Distribution Company Ombudsman

- a) An Integrated Distribution Company shall appoint an ombudsman to investigate all non-anonymous informal complaints alleging that the Integrated Distribution Company has violated any provision of Subpart B.
- b) The ombudsman shall be appointed by the Integrated Distribution Company for a term of not less than one year and shall not be removed except for cause. The ombudsman shall be currently or formerly employed by the Integrated Distribution Company on a salary basis with policymaking, managerial, professional, or supervisory responsibilities. The ombudsman's

salary and other compensation shall not be decreased during his or her term. The ombudsman shall not be part of "Corporate support" as that term is defined in Section 450.10 of the Commission's rules for Non-Discrimination in Affiliate Transactions for Electric Utilities (83 Ill. Adm. Code 450).

- c) Informal complaints may be brought by any person or entity eligible to bring a formal complaint under Section 452.330
- d) The ombudsman shall promptly investigate all non-anonymous informal complaints concerning whether any actions, omissions, policies or practices of the Integrated Distribution Company, its employees or agents have failed to fully comply with any provision of Subpart B of this Part. In conducting such investigations, the ombudsman shall review relevant records and reports of the Integrated Distribution Company, interview employees or agents of the Integrated Distribution Company and any third parties with knowledge of the facts alleged, and shall present written findings and recommendations to the complainant and to the Integrated Distribution Company within 20 days of the submittal of the complaint to the ombudsman.
- e) The recommendations of the ombudsman shall not be legally binding against the complainant or the Integrated Distribution Company. The complainant may at any time file a formal complaint with the Commission pursuant to Section 452.310. A complainant otherwise subject to 83 Ill. Adm. Code 280.170 shall not be required to file an informal complaint with the Commission if the Complainant has received the findings and recommendations of the ombudsman in accordance with subsection (d).
- f) Upon presentation of findings and recommendations to the complainant and the IDC, any original documents received from a complainant shall be returned by the ombudsman. No copies or descriptions of such documents shall be retained by the IDC, except that the ombudsman may retain such copies and descriptions under seal but shall not distribute or otherwise disclose their contents to any other IDC employee or agent after presentation of findings and recommendations in accordance with subsection (d).
- g) The ombudsman shall file an annual report to the Commission, stating: 1) the number of complaints received during the preceding calendar year, by month; 2) the percentage of such complaints that subsequently became the subject of formal complaints or other adversarial proceedings; and 3) such other information that the ombudsman believes essential to an understanding of the performance of that office. Such report shall be filed annually by the first business day in March.
- h) Nothing in this Section shall prevent any person from attempting to resolve its informal complaint with an Integrated Distribution Company through Integrated Distribution Company employees and channels other than the ombudsman.

Analysis

This section is derived from Staff's proposed Section 452.320 and ComEd's proposed Section 452.310. Under each proposal, the IDC would appoint an ombudsman to receive, promptly review, and offer recommendations regarding complaints by customers, competitors and others.

As a general proposition, the Commission welcomes constructive proposals for resolving disputes without resort to adversarial processes. Indeed, the Commission's own Rules of Practice contain an informal complaint provision (83 Ill. Adm. Code 200.160) that authorizes the presentation of disputes to Commission personnel for non-binding resolution. Moreover, 83 Ill. Adm. Code 280.170 makes such an informal complaint "by an applicant [for utility service], customer, user or utility" a prerequisite to the filing of a formal complaint pursuant to 83 Ill. Adm. Code 200.170.

This section authorizes an informal dispute resolution procedure involving an IDC ombudsman rather than Commission personnel. Per subsection (e), a complainant that would otherwise be subject to 83 Ill. Adm. Code 280.170 will not have to file an informal complaint with our Consumer Assistance Section if that complainant proceeds under this section and receives the ombudsman's findings and recommendations in accordance with subsection (d). However, subsection (e) also permits a complainant to bypass the ombudsman procedure and file a complaint with the Commission. 83 Ill. Adm. Code 280.170 would apply if that complainant were an "applicant, customer, user or utility."

By authorizing a dispute resolution procedure involving IDC personnel, this section creates implications that are not associated with informal complaints to the Commission. First, because an ombudsman will be an IDC employee, that position can be abused to the detriment of competition, due process and the public interest. An ombudsman could acquire commercially sensitive information from complainants and transfer it to other IDC employees. An ombudsman could aide the IDC by obtaining information and admissions that would be advantageous in defeating a formal complaint or other adversarial proceeding. An ombudsman could be apprised of a "whistleblower" or other IDC employee who had disclosed the information giving rise to a complaint. We have included subsection (f) to assert some measure of control over the use, transfer and return of information acquired by an ombudsman.

Second, as an IDC employee, the ombudsman requires insulation from company incentives and pressures that would tend to compromise fairness. Therefore, subsection (b) contains provisions intended to shield the ombudsman from certain manifestations of IDC disapproval. Even with these measures, an ombudsman will still be subject to incentives and pressures associated with compensation, longevity and career advancement within the IDC, both during and after tenure as an ombudsman. To fully constrain such incentives and pressures would require a far more detailed set of rules or, alternatively, that the ombudsman be completely independent of the IDC. However, the Commission will take neither step with respect to a voluntary, non-binding dispute resolution mechanism. Through actual performance, an ombudsman will either

establish credibility as a viable alternative or will be ignored by complainants.

Subsection (g) includes a modest annual reporting requirement to provide the Commission with general information concerning the performance of each IDC ombudsman.

Section 452.350 Penalty Provisions

- a) Upon complaint pursuant to Section 452.330 of this Part, or on the Commission's own motion, the Commission may, after notice and hearing:
 - (1) order an Integrated Distribution Company to cease and desist, or correct, any violation of, or nonconformance with, any provision of Subpart B;
 - (2) require an Integrated Distribution Company to make due reparations or refunds as permitted by statute;
 - (3) impose financial penalties for violations of, or non-conformance with, any provision of Subpart B as permitted by statute;
 - (4) take other remedial and preventive action as permitted by statute.

Such remedies shall be cumulative.

- b) Upon finding that an Integrated Distribution Company has committed, within any five-year period, three violations of any provision of Subpart B, the Commission may determine that such electric utility no longer qualifies as an Integrated Distribution Company. The Commission may direct such an electric utility to immediately file with the Commission an implementation plan to comply with Subpart A. The Commission shall evaluate any such implementation plan under the provisions of Section 452.170(b).
- c) Multiple violations arising from the same facts shall be regarded as a single violation for purposes of reaching the three-violation threshold established in subsection (b). Each violation arising from different facts shall be regarded as a single violation for purposes of reaching the three-violation threshold established in subsection (b). Plural factual allegations may be included in a single complaint or investigation.
- d) The remedies set forth in subsections (a) and (b) shall be cumulative.

Analysis

ComEd's proposed penalty provision (proposed Section 452.320) incorporates the penalties applicable to functionally separated utilities subject to Subpart A of these rules. Additionally, ComEd proposes revocation of IDC status as a specific penalty applicable to utilities subject to Subpart B. Under that proposal, the Commission could order revocation upon a finding, after a hearing, that the IDC had committed three

material violations of certain provisions of Subpart B within a five-year period. A violation would be material if committed with "specific intent" and if it had "substantial impact upon the market."

Staff also includes specific intent and market impact as necessary elements of a material violation, but departs from ComEd's position by treating them as alternative elements, either of which would sustain revocation. Staff further differs from ComEd in that a violation of *any* provision of Subpart B would be counted toward the three-violation threshold for loss of IDC status.

NewEnergy opposes both the specific intent and market impact requirements. NewEnergy Reply Comments, at 2. C&GP argue that the threshold for revocation of IDC status should be a single material violation. C&GP Reply Comments, at 3.

By requiring proof of specific intent, market impact and multiple violations, and by predetermining that only certain Subpart B rules can be abridged in a material fashion, ComEd evinces an apprehension that this Commission might act precipitously to withdraw IDC status. ComEd also cautions that competitors might resort to "litigation as a competitive tool." ComEd Reply Comments, at 46. Even if such concerns are warranted, the Commission must balance them against the potential harm to competition if enforcement of our rules is effectively hobbled by vague or unnecessary standards. We believe that the likelihood of competitive entry will be significantly reduced if prospective competitors rationally perceive that anti-competitive behavior by the incumbents will go unchecked under our rules.

Consequently, we will not adopt ComEd's materiality standard. Neither component of that standard - market impact or specific intent - is appropriate to our purposes, but both will make enforcement of our rules needlessly difficult. We agree with NewEnergy that a search for the market impact of a single IDC act or omission will waste resources and yield no useful result. NewEnergy Reply Comments, at 2. Additionally, we reject the notion that adverse impact for some lesser number of customers than "the market" is immaterial. Moreover, NewEnergy is correct that an IDC's "commitments in lieu of functional separation are not commitments to refrain from having a substantial adverse impact on the market but, rather, to refrain from certain conduct." *Id.*

With regard to specific intent, such a standard would involve us in psychological issues that, even if properly examined, will not ultimately further the Commission's interest in efficient, non-discriminatory competition. When an employee's intent is anti-competitive, but not specifically associated with a particular rule, or when an employee acts anti-competitively but without knowledge of our rules (perhaps because of inadequate training by the IDC), the harm to competition may be no less severe than in the case of an intentional violation.

Furthermore, the Commission will not substitute another materiality standard for ComEd's. The Commission believes that any violation adversely impacts the market, to the extent that a carefully designed and interconnected framework for promoting customer choice has been disregarded. We will determine on a case-by-case basis whether such impact, along with other factors (such as the number of customers affected, the frequency of violation and the adequacy of intra-IDC safeguards) warrants revocation of IDC status. Since this Commission will not allow trivial or hypertechnical violations to provide a basis for terminating IDC status, and will not assume that future Commissioners will do otherwise, there is no demonstrated need for a materiality standard.

Similarly, the Commission adopts Staff's position that violation of *any* provision in our rules may be counted toward the three-violation threshold established today. We believe that every rule here is important to the development of efficient, nondiscriminatory competition. Indeed, we would not adopt a rule that failed to meet that test. Therefore, our rules cannot be divided into non-critical rules, that could be contravened without consequence to IDC status, and rules that "go the heart of the protection for competition," as ComEd suggests. ComEd Reply Comments, at 46.

In view of the foregoing conclusions, the Commission will not subject a utility's IDC status to revocation on the basis of a single violation of our rules. C&GP assert that a single violation policy would "discourage IDCs from making conscious choices to violate the rules twice before complying." C&GP Reply Comments, at 3. However, because we reject ComEd's materiality requirement, an IDC will bear responsibility for omissions and negligence as well as for "conscious choices." Consequently, IDC status would be too precarious if it were revocable upon a single violation.

The Commission notes, however, that no party discusses what constitutes a single violation. In a complaint proceeding, the same act, omission or policy may be found to contravene multiple rules. Moreover, several acts, omissions or policies may be addressed in a single complaint. On the one hand, the Commission does not find it advisable to use the same facts as a basis for multiple violations, for purposes of reaching the revocation threshold. On the other hand, we conclude that multiple factual situations can be addressed in the same complaint and, if proven, can constitute multiple violations, each counted against the threshold.

Subpart (a) of this section adopts the general penalty provisions that both Staff and ComEd exported from Subpart A of these rules. However, since neither Staff nor ComEd expressly states that these general penalties may be imposed cumulatively with the IDC-specific penalty we adopt in subsection (b), the Commission has added subsection (d) to make that point clear.

Section 452.360 Integrated Distribution Company Instruction

- a) An Integrated Distribution Company shall instruct its affected employees and agents about the requirements of Subpart B and how to apply Subpart B in

the work place.

Analysis

This provision is drawn from ComEd's proposed Section 452.330 and Staff's proposed Section 452.340.

Provision not adopted

Staff's proposed Section 452.350 would require an IDC to report annually regarding its "efforts and plans to reduce its presence as a provider of power and energy to retail customers within its service territory...and plans to create competition in the provision of service required to be provided under" subsections of Section 16-103 of the Act. Staff contends that this provision implements the mandate in Section 16-119A to proactively adopt measures that create efficient competition. Staff Init. Comments, at 31.

ComEd responds that Staff's recommendation would "artificially" compel a market share reduction, rather than achieving that result through "customer decisions in the market." ComEd Reply Comments, at 49-50. ComEd also criticizes Staff's proposal for imposing "on one participant in the market the obligation to create competition in retail electric supply." *Id.*, at 50.

With regard to the latter issue, the Commission agrees with ComEd. The Act places a duty to promote efficient competition on the Commission, not on the incumbent utilities. We are implementing that mandate by adopting measures to restrict the incumbents' from utilizing opportunities to suppress competition. That is fundamentally different from requiring the incumbents to "create" competition among other energy suppliers. Moreover, the steps that the utilities might take to create competition are neither clear nor necessarily desirable. The incumbents are prohibited from exiting the retail electric power market and the Commission will certainly not order them to reduce the quality of required services.

Staff's other reporting proposal presents a closer question. A reduced presence as a retail electric power provider is an important element in the "tradeoff" for IDC status. However, these rules already require an IDC to reduce that presence and to file a plan explaining how it will do so. While additional reduction mechanisms, such as Staff's block bidding proposals, may well be desirable, the Commission prefers to assess those mechanisms in another proceeding and, if appropriate, implement them on a global basis for all electric utilities. Accordingly, since the Commission will not require the incumbents to devise additional plans for market share reduction in these proceedings, we will not impose additional reporting requirements.

VII. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the subject matter of this proceeding;
- (2) it is appropriate to implement subsections (a) and (b) of Section 16-119A of the Act in a unitary proceeding; accordingly, Dockets 98-0147 and 98-0148 should be formally consolidated by this Order.
- (3) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) an Interim Order should be issued in these proceedings, to be merged with any other Interim Order in these proceedings to comprise the final Order of the Commission in Dockets 98-0147 and 98-0148;
- (5) the rules at 83 Ill. Adm. Code 452 as reflected in the Appendix to this Order, should be submitted to the Secretary of State to begin the first notice period.

IT IS THEREFORE ORDERED that the rules at 83 Ill. Adm. Code 452, as reflected in the attached Appendix, are adopted pursuant to Section 5-40 of the Illinois Administrative Procedure Act, and that the Notice of Rules be submitted to the Secretary of State.

IT IS FURTHER ORDERED this Interim Order shall be merged with any other Interim Order issued in these proceedings to comprise the final Order of the Commission in Dockets 98-0147 and 98-0148.

IT IS FURTHER ORDERED that this Order is not final; it is not subject to the Administrative Review Law.

ORDER DATE
2000

April 19,

BRIEFS ON EXCEPTIONS

May 5, 2000

REPLY BRIEFS ON EXCEPTIONS

May 12, 2000

APPENDIX B

A. FUNCTIONALLY SEPARATED UTILITY RULES [Sections 452.20 - 452.180]

Section 452.10 Applicability

An electric utility shall be subject to Subpart A or Subpart B of this Part. Subpart A shall apply to each electric utility conducting operations in Illinois that is not otherwise approved to operate as an Integrated Distribution Company pursuant to Subpart B. Any electric utility subject to Subpart A whose principal service area is not in Illinois shall be exempt from Sections 452.30, 452.35, 452.40 and 452.60 and any other section of Subpart A wherein such exemption is expressly provided. Subpart B of this Part is an option available to electric utilities that elect to become subject to Subpart B and that are approved to operate as an Integrated Distribution Company pursuant to Subpart B.

B. INTEGRATED DISTRIBUTION COMPANY RULES
[Sections 452.200 - 452.360]

Section 452.200 Definitions

“Advertising” means any communication through any medium, except direct (e.g., in-person or telephonic) contact, for the purpose of requesting or retaining patronage from a customer or prospective customer.

“Company leadership” has the same meaning as in Subpart A of this Part.

“Delivery services” has the same meaning as in Section 16-102 of the Act [220 ILCS 5/16-102]; for purposes of this Subpart B, delivery services are transmission and distribution services.

“Electricity usage service” means any service, other than a transmission and distribution service, that involves or pertains to the usage or consumption of electricity by a retail customer.

“Integrated Distribution Company” means an electric utility that has completed implementation of an approved implementation plan pursuant to Section 452.220 of this Subpart B.

“Marketing” means direct contact with a customer or a prospect for the purpose of requesting or retaining patronage.

“Power purchase option” means the delivery services customer power purchase option in Section 16-110 of the Act [220 ILCS 5/16-110]; for purposes of this Subpart B, the power purchase option is retail electric power.

“Retail electric power” is electric power or energy sold at retail; for purposes of this Subpart B, retail electric power is an electricity usage service.

“Transmission and distribution service” means any service provided by an electric utility’s transmission and distribution system.

“Transmission and distribution system” has the same meaning as in Subpart A of this Part.

“Value-added transmission and distribution service” has the same meaning as in Subpart A of this Part.

Section 452.220 Integrated Distribution Company Implementation Plan

a) To seek Commission approval to operate as an Integrated Distribution Company, an electric utility shall file a written plan by which it will implement, and affirm its commitment to comply with, the provisions of Subpart B. The implementation plan shall be sufficiently detailed so that the Commission can reasonably ascertain the systems, policies and practices that the electric utility will use to satisfy each of the requirements in Subpart B. The implementation plan shall include employee compensation, reward and penalty provisions designed to eliminate incentives, financial or otherwise, for Integrated Distribution Company employees, or for the Integrated Distribution Company, to contravene any provision of Subpart B. The implementation plan shall not be approved unless it demonstrates that the compensation changes, bonuses and career advancement of IDC employees are determined without taking into account revenues derived from electricity usage services.

b) Within 45 days after an electric utility files an implementation plan with the Commission pursuant to subsection (a), the Commission shall approve, reject, or initiate a hearing to investigate, the implementation plan. If the Commission takes no such action within 45 days, the implementation plan shall be deemed approved. If the Commission initiates a hearing to investigate the implementation plan, intervention in accordance with 83 Ill. Adm. Code Part 200 shall be permitted. After such hearing, the Commission shall approve the implementation plan as filed or as modified by the Commission, or reject the implementation plan. In any order entered pursuant to this subsection, the Commission shall set forth its reasons for approving or

rejecting an implementation plan. If its implementation plan is rejected by the Commission, a utility may not file another implementation plan within 180 days of a final order of rejection, without leave of the Commission.

c) In any order rejecting an implementation plan, the Commission shall specify the date by which an electric utility shall be in compliance with Subpart A of

- this Part. Within 45 days after the entry of a final order approving an implementation plan, or within 45 days after the implementation plan is permitted to go into effect without a Commission order pursuant to subsection (b), an electric utility shall be in full compliance with all requirements of Subpart B. Upon written motion by a utility, and upon a finding of good cause, the Commission may grant additional time for achieving full compliance.
- d) An electric utility authorized by the Commission to operate under Subpart B may file a request to become subject to Subpart A of this Part. If the Commission finds such request to be in the public interest, the electric utility shall submit an implementation plan to comply with Subpart A. The Commission shall assess such implementation plan as provided by Section 452.170(b) of this Part. An electric utility proceeding under this subsection shall remain subject to all requirements of Subpart B until 60 days after the Commission issues its final order pursuant to Section 452.170(b), unless the Commission otherwise orders.
 - e) An electric utility authorized by the Commission under Section 452.170 to operate under Subpart A may file a request to become subject to Subpart B of this Part. If the Commission finds such request to be in the public interest, the electric utility shall submit an implementation plan to comply with Subpart B. The Commission shall assess such implementation plan as provided in subsections (b) and (c) of this Section. An electric utility proceeding under this subsection shall remain subject to all requirements of Subpart A until 45 days after the Commission issues its final order pursuant to subsections (b) and (c), unless the Commission otherwise orders.
 - f) Each Integrated Distribution Company shall file with the Commission revisions to an approved implementation plan within 7 days of revision or at such time as designated by the Commission. The Commission may initiate a proceeding to disallow or modify any such revision; in such proceeding, the burden shall be upon the IDC to demonstrate that the revision is consistent with the provisions of Part B and the public interest.

Section 452.230 Permissible and Impermissible Integrated Distribution Company Services

- a) An Integrated Distribution Company may provide transmission and distribution (including delivery services), all tariffed services required by the Act (including the power purchase option), value-added transmission and distribution services, and billing and pricing experiments for transmission or distribution services. An Integrated Distribution Company may also enter into contracts with end-user customers for load curtailment, and contracts with

power producers for standby services, auxiliary services, or transmission and distribution services pertaining to maintenance. Any service offered by an Integrated Distribution Company, whether by tariff or contract, shall be made equally available to all eligible customers. An Integrated Distribution Company shall not offer or provide retail electricity usage services, except as allowed by this section.

- b) Beginning on the day it files a written implementation plan under Section 452.220(a), an Integrated Distribution Company shall not, notwithstanding Sections 16-102, 16-116(b), and 9-102.1 of the Act [220 ILCS 5/16-102, 5/16-116(b), and 5/9-102.1], enter into any contract for the provision of any retail electricity usage service. An IDC shall not renew, extend, or renegotiate any existing contract for any electricity usage service, except to the extent that the Integrated Distribution Company is contractually bound to renew, extend, or renegotiate at the customer's option and the customer has exercised its option. At the request of the Commission, an Integrated Distribution Company shall make available for inspection by the Commission any or all existing contracts for the provision of any electricity usage service. The Commission shall treat all such contracts confidentially and shall enter such contracts into the record in any proceeding before the Commission subject to a reasonable confidentiality agreement.
- c) An Integrated Distribution Company shall not, through the offering or provision of any contract, billing or pricing experiment, or value-added transmission or distribution service, provide an inducement to stay on, switch back to, or purchase, any electricity usage service. An Integrated Distribution Company shall not offer or provide a discount on retail electricity usage service in connection with any contract, (except for contracts permitted under subsection (b)), billing or pricing experiment, or value-added transmission or distribution service.

Section 452.240 Advertising, Marketing, and Customer Retention Efforts

- a) An Integrated Distribution Company shall not advertise or market with regard to the offering of any electricity usage service.
- b) The advertising and marketing prohibition of subsection (a) shall not preclude an Integrated Distribution Company from: (1) advertising or marketing distribution services; (2) using the electric utility company corporate name and logo in connection with the offering or provision of permissible Integrated Distribution Company services; (3) engaging in advertising or marketing generally promoting the public image and good will of the Integrated Distribution Company as a provider of transmission and distribution; (4) meeting its obligations for consumer education programs as set forth in Section 16-117 of the Act [220 ILCS 5/16-117], or otherwise engaging in

legitimate consumer education efforts; or (5) meeting the customer notification requirements specified in Section 16-110 [220 ILCS 5/16-110] for the power purchase option.

- c) No Integrated Distribution Company employee or agent shall state or imply that access to or quality of service for delivery of electricity is, or will be, better if the customer retains, switches to, or otherwise obtains any electricity usage service from the Integrated Distribution Company.
- d) No Integrated Distribution Company employee or agent shall affirmatively prompt customer inquiries about the quality of the Integrated Distribution Company's electricity usage services. No Integrated Distribution Company shall disparage the quality of an alternative retail electric supplier's electricity usage services.
- e) No Integrated Distribution Company employee or agent shall affirmatively act to retain or obtain a customer for any electricity usage service offered or provided by the Integrated Distribution Company.

Section 452.250 Integrated Distribution Company Rate, Price and Billing Conditions

- a) An Integrated Distribution Company shall not change its tariff to reduce the price for any tariffed service pursuant to Section 16-111(f) of the Act [220 ILCS 5/16-111(f)], but may change its tariff to reduce rates for such services in the manner provided in Article IX of the Act [220 ILCS 5/9-201, *et seq.*], and as provided in subparagraphs (1) through (4) of subsection (a) of Section 16-111(a) of the Act [220 ILCS 5/16-111(a)(1)-(4)].
- b) An Integrated Distribution Company providing bundled retail electric power to customers eligible for delivery services under Section 16-104 of the Act [220 ILCS 5/16-104] shall separately state on the customer's bill the price of the components of that tariffed service that would be: 1) subject to the Federal Energy Regulatory Commission's transmission rate authority if the bundled retail electric power were being provided as an unbundled service; and 2) subject to the Commission's delivery services rate authority if the bundled retail electric power were being provided as an unbundled service.

Section 452.260 Comparability of Access to Transmission and Distribution System Information - Integrated Distribution Company Internal Information Transfer Conditions

- a) The transmission and distribution system information covered by this Section shall include transmission or distribution construction plans, transmission or distribution abandonment plans, planned transmission or distribution system upgrades, downgrades, or modifications, planned transfer or sale of transmission or distribution facilities, transmission or distribution maintenance or outage plans or schedules, transmission or distribution

forced outage data, historic transmission or distribution outage and restoration data, availability of transmission capacity, transmission or distribution facilities ratings, availability of value-added transmission and distribution services, forecasted or scheduled new customer interconnection information, and customer emergency curtailment information and any other transmission and distribution information that directly affects the availability or quality of the transmission and distribution system.

- b) Within 24 hours of the acquisition of the information described in subsection (a) by IDC company leadership, an IDC shall post such information on an internet site pre-specified and publicized as provided in subsection 452.80(e) of SubPart A of this Part, and shall also provide such information by fax to all non-affiliated ARES and persons with valid standing requests as provided in subsection (c) of this section. The electric utility shall keep a log listing and describing all such instances. The log shall be available for Commission inspection and shall be made available to the public upon request. Entries in the log shall be retained for three years.
- c) Any non-affiliated ARES or any customer may submit to the person in charge of the electric utility's transmission and distribution system a written standing request for the information to be provided under subsection (b). In acknowledging receipt of such standing requests, each electric utility shall inform the requester of the internet site where the information to be provided under subsection (b) can be found. Standing requests made pursuant to this subsection shall expire one year after being received by the person in charge of the electric utility's transmission and distribution system unless renewed in writing by the non-affiliated ARES or customer. Provided that an electric utility publicizes the internet location for the information to be provided under subsection (b), the standing request option in this subsection (c) shall expire three years from the effective date of this Part.
- d) Access by Integrated Distribution Company employees to the information described in subsection (a) shall be limited to the maximum practical extent until such information is posted on the internet site described in subsection (b). No Integrated Distribution Company employee or agent shall use any information described in subsection (a) to sell, promote, market, advertise, or describe to any customer or prospective customer any service provided by the Integrated Distribution Company until such information is posted on the internet site described in subsection (b).

Section 452.270 Information From Customers and Others - Provided to the Integrated Distribution Company By An Affiliated or Non-Affiliated ARES, Customer of Affiliated or Non-Affiliated ARES, or Retail Customer of the Integrated Distribution Company

- a) The information covered by this Section shall include any data or information provided to the Integrated Distribution Company in its role as a provider of

transmission and distribution by an affiliated or non-affiliated ARES, customer of an affiliated or non-affiliated ARES, or retail customer of the utility.

- b) No Integrated Distribution Company employee shall use the information described in subsection (a) to sell, promote, market or advertise any electricity usage service or to attempt to obtain or retain any customer for any electricity usage service; provided that Information received from a retail customer of the Integrated Distribution Company that is necessary to the continued provision of a permissible IDC retail electric power service to that customer may be used by the Integrated Distribution Company for that purpose.

Section 452.280 Tying

An Integrated Distribution Company shall not tie, as defined by state and federal anti-trust laws, the provision of any tariffed service to the taking of any other product or service offered or provided by the Integrated Distribution Company.

Section 452.290 Integrated Distribution Company Transmission and Distribution Services

- a) All requests for transmission and distribution services shall be processed in a non-discriminatory manner.
- b) An Integrated Distribution Company shall strictly enforce all tariff provisions relating to transmission and distribution services if these tariff provisions do not provide for the use of discretion.
- c) If provisions of transmission and distribution services tariffs allow for discretion, an Integrated Distribution Company shall apply these tariff provisions in a fair, impartial and non-discriminatory manner. Similarly situated transmission and distribution services users or potential transmission and distribution services users shall be treated equally.
- d) An Integrated Distribution Company shall not discriminate in matters relating to curtailment, interconnection, service restoration, repair work, transmission and distribution upgrading, scheduling, priority, balancing, or transmission and distribution services availability, price or service quality.
- e) If an Integrated Distribution Company offers or attributes a rate discount, rebate, or fee waiver on delivery services or other transmission and distribution services to customers of its permissible electricity usage services, it shall also offer the same discount, rebate, or fee waiver to all alternative retail electric suppliers or customers of alternative retail electric suppliers.

The Integrated Distribution Company shall maintain a log of all such discounts, rebates, or fee waivers granted. The entry in the log shall be made within 24 hours of the time the transmission and distribution services transaction commences. The entry in the log shall be maintained for one year after such discount, rebate, or fee waiver expires. The log shall be available for Commission inspection. The log shall be made available to the public upon written request.

Section 452.300 Personnel Transfers

Employment transfers of Integrated Distribution Company employees and agents shall not be used or allowed to circumvent any provision of Section 452.260 of this Part.

Section 452.310 Emergency Exception

- a) In anticipation of impending emergencies and in times of actual emergency affecting the public health and safety or electric system integrity and reliability, an Integrated Distribution Company may take any actions necessary to protect the public and the electric system. If under normal non-emergency circumstances, those actions would constitute violations of this Part, the Integrated Distribution Company shall file written reports as specified below.
- b) Within 24 hours of initiating reliance on the authority in subsection (a), an Integrated Distribution Company shall: 1) file an initial written report with the Commission, describing, and stating the general reasons for, such action; and 2) notify non-affiliated ARES on the internet site described in subsection (e) of Section 452.80 of this SubPart A of this Part.
- c) Within seven days of initiating reliance on the authority in subsection (a), or within two days of terminating reliance on the authority in subsection (a), whichever is later, the Integrated Distribution Company shall file a full written report with the Commission, explaining the nature and extent of the emergency and how and why the emergency arose. This report shall also list and describe each action the electric utility took which, under non-emergency circumstances, would constitute a violation of this Part. The initial and full written reports shall be available to the public on the internet site described in subsection (e) of Section 452.80 of this SubPart A of this Part.
- d) Nothing in this Section shall preclude the Commission from investigating, upon its own motion, or upon complaint by any person pursuant to Section 452.330 of this Part, whether the actions or omissions of an Integrated Distribution Company pursuant to subsection (a) were reasonably related to an impending or actual emergency affecting the public health and safety or electric system integrity or reliability. If, after a hearing, no such reasonable

relationship is found, the Commission may impose one or more penalties as authorized by Section 452.350 of the Part.

Section 452.320 Cross-subsidization

No Integrated Distribution Company shall use public utility business to subsidize non-public utility business. Accordingly, the Integrated Distribution Company shall comply with the requirements of the Commission's rules regarding accounting for non-public utility business of electric utilities (83 Ill. Adm. Code 416), the Uniform System of Accounts (83 Ill. Adm. Code 415), and such orders of the Commission under Section 7-102 of the Act [220 ILCS 5/7-102] as may be applicable.

Section 452.330 Formal Complaint Procedures

Complaints alleging violation by an Integrated Distribution Company, its employees or agents of any provision of Subpart B shall be filed pursuant to 83 Ill. Adm. Code 200. Nothing in Section 452.340 shall impair any person's right to bring a claim under this Section.

Section 452.340 Informal Dispute Resolution Procedures - Integrated Distribution Company Ombudsman

- a) An Integrated Distribution Company shall appoint an ombudsman to investigate all non-anonymous informal complaints alleging that the Integrated Distribution Company has violated any provision of Subpart B.
- b) The ombudsman shall be appointed by the Integrated Distribution Company for a term of not less than one year and shall not be removed except for cause. The ombudsman shall be currently or formerly employed by the Integrated Distribution Company on a salary basis with policymaking, managerial, professional, or supervisory responsibilities. The ombudsman's salary and other compensation shall not be decreased during his or her term. The ombudsman shall not be part of "Corporate support" as that term is defined in Section 450.10 of the Commission's rules for Non-Discrimination in Affiliate Transactions for Electric Utilities (83 Ill. Adm. Code 450).
- c) Informal complaints may be brought by any person or entity eligible to bring a formal complaint under Section 452.330
- d) The ombudsman shall promptly investigate all non-anonymous informal complaints concerning whether any actions, omissions, policies or practices of the Integrated Distribution Company, its employees or agents have failed to fully comply with any provision of Subpart B of this Part. In conducting such investigations, the ombudsman shall review relevant records and reports of the Integrated Distribution Company, interview employees or

agents of the Integrated Distribution Company and any third parties with knowledge of the facts alleged, and shall present written findings and recommendations to the complainant and to the Integrated Distribution Company within 20 days of the submittal of the complaint to the ombudsman.

- e) The recommendations of the ombudsman shall not be legally binding against the complainant or the Integrated Distribution Company. The complainant may at any time file a formal complaint with the Commission pursuant to Section 452.310. A complainant otherwise subject to 83 Ill. Adm. Code 280.170 shall not be required to file an informal complaint with the Commission if the Complainant has received the findings and recommendations of the ombudsman in accordance with subsection (d).
- f) Upon presentation of findings and recommendations to the complainant and the IDC, any original documents received from a complainant shall be returned by the ombudsman. No copies or descriptions of such documents shall be retained by the IDC, except that the ombudsman may retain such copies and descriptions under seal but shall not distribute or otherwise disclose their contents to any other IDC employee or agent after presentation of findings and recommendations in accordance with subsection (d).
- g) The ombudsman shall file an annual report to the Commission, stating: 1) the number of complaints received during the preceding calendar year, by month; 2) the percentage of such complaints that subsequently became the subject of formal complaints or other adversarial proceedings; and 3) such other information that the ombudsman believes essential to an understanding of the performance of that office. Such report shall be filed annually by the first business day in March.
- h) Nothing in this Section shall prevent any person from attempting to resolve its informal complaint with an Integrated Distribution Company through Integrated Distribution Company employees and channels other than the ombudsman.

Section 452.350 Penalty Provisions

- a) Upon complaint pursuant to Section 452.330 of this Part, or on the Commission's own motion, the Commission may, after notice and hearing:
 - (1) order an Integrated Distribution Company to cease and desist, or correct, any violation of, or nonconformance with, any provision of Subpart B;
 - (2) require an Integrated Distribution Company to make due reparations or refunds as permitted by statute;

- (3) impose financial penalties for violations of, or non-conformance with, any provision of Subpart B as permitted by statute;
- (4) take other remedial and preventive action as permitted by statute.

Such remedies shall be cumulative.

- b) Upon finding that an Integrated Distribution Company has committed, within any five-year period, three violations of any provision of Subpart B, the Commission may determine that such electric utility no longer qualifies as an Integrated Distribution Company. The Commission may direct such an electric utility to immediately file with the Commission an implementation plan to comply with Subpart A. The Commission shall evaluate any such implementation plan under the provisions of Section 452.170(b).
- c) Multiple violations arising from the same facts shall be regarded as a single violation for purposes of reaching the three-violation threshold established in subsection (b). Each violation arising from different facts shall be regarded as a single violation for purposes of reaching the three-violation threshold established in subsection (b). Plural factual allegations may be included in a single complaint or investigation.
- d) The remedies set forth in subsections (a) and (b) shall be cumulative.

Section 452.360 Integrated Distribution Company Instruction

- a) An Integrated Distribution Company shall instruct its affected employees and agents about the requirements of Subpart B and how to apply Subpart B in the work place.